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THE RT. HON SIR DINSHAH FARDUNJI MULLA

# PRINCIPLES OF MAHOMEDAN LAW

BY

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**TWELFTH EDITION**

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Price Rs 6 (nett)

**THE EASTERN LAW HOUSE, CALCUTTA,  
BOOKSELLERS & PUBLISHERS**

**1944**

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PRINTED BY R. NARAYANASWAMI IYER AT THE MADRAS LAW JOURNAL PRESS,  
MYLAPORE, MADRAS, AND  
PUBLISHED BY EASTERN LAW HOUSE, COLLEGE SQUARE, CALCUTTA

## PREFACE TO THE TWELFTH EDITION.

Since the last edition of this work, two more enactments have been placed on the statute book, one of which has materially altered the law of divorce among the Muslim community as a whole, and the other, the law of inheritance and succession as applicable to Cutchi Memons. The Dissolution of Muslim Marriages Act (VIII of 1939) came into force on the 17th March, 1939, and although according to the preamble it purports to be declaratory, there can be no doubt that it is not merely declaratory in many respects, at least as regards the Hanafi Code of Muslim Law, and on general principles cannot be held to be retrospective in its operation. This view has been taken by two judges of the High Court of Lahore, whereas another learned judge of the same Court has held otherwise. The law of inheritance and succession amongst the Cutchi Memons has undergone changes more than once, but henceforth in the matter of testate and intestate succession they will, under the Cutchi Memons Act (X of 1938) read with the Shariat Act of 1937, be governed by the general Mahomedan Law. An interesting question, however, arises, as to whether the Cutchi Memons Act of 1938 is not *ultra vires* of the Central Legislature in so far as the Act affects agricultural lands in the Governors' Provinces.

There have been numerous decisions, in recent years, upon various points of Mahomedan Law, most of which have been incorporated in the text, but a few may be noticed here. In the well-known *Sahidganj case* (1940) the Privy Council held that it is the duty of the Courts to interpret the law in cases of Hindu and Mahomedan Law and not to depend upon the opinion of experts. It was further held that wakf property may be lost by adverse possession. In the same case the question whether a mosque is a juristic person or not was discussed, and although their Lordships reserved their opinion on it, the trend of their observations shows that they did not approve of the view that a mosque is a juristic person, which the Lahore High Court had taken in 1926. In *Sabir Hussain v. Farizhand Hasan* (1938) the Privy Council laid down that in matters of procedure it is

the general law and not the Mahomedan Law or procedure that governs the courts. In *Mahomed Kazim Ali v. Faruq Ali* (1938) the right of an heir to proceed against his co-heirs for contribution in case he received less than his share by reason of the action of a judgment-creditor under a decree under sec. 52 of the Civil Procedure Code was maintained. The question of limitation for an administrative action is now settled by the Privy Council. As regards immovables it will be article 144 and for movables article 120 *Mahmedally v. Safrabai* (1940). *Mt. Ali Begum v. Ali Khan* (1938) overrules the view taken by the Allahabad High Court in an early case (1906) that a provision that the endowment shall not take effect till the death of the settlor's wife is valid.

In *John Jiban Chandra Dutt v. Abinash Chandra* (1939) the High Court of Calcutta held that a Christian husband who embraces the Islamic faith is entitled to marry again, even during the subsistence of the first marriage. The same court has expressed the opinion that the rule of Mahomedan Law that where one of two spouses embraces the Islamic faith, if the other on its being presented to him, does not adopt it the marriage is dissolved, was obsolete and opposed to public policy (*Noor Jehan v. Eugene Tischenko*, 1941).

The case of *Ajmad Khan v. Ashraf Khan*, though decided by the Judicial Committee in 1929, is still engaging the attention of the High Courts in India, and the Chief Court of Oudh has held that the saying of the Prophet that the gift of a life estate is enhanced into an absolute estate is not applicable to a testamentary bequest. This, however, seems to be contrary to the long accepted view that the saying of the Prophet in this respect is applicable both to gifts and to wills.

I wish to record my thanks to Mr. K. S. Shavaksha, Barrister-at-Law, for his great assistance in the preparation of this Edition, and for his many useful suggestions. Acknowledgments are also due to Mr. V. G. Wagle, Advocate (O.S.), for collecting the materials for this Edition.

It is to be hoped that this new Edition which the Right Honourable Sir George Claus Rankin, Kt., LL.D., has described as an "established text book" will be considered to be as useful as its predecessors.

December 1943.

S. S. RANGNEKAR.

## INTRODUCTION.

The Prophet Mahomed was born at Mecca and his birth may on the strength of tradition be dated approximately as A.D. 570. His father's name was Abdulla and his mother's Amina. He was a posthumous child. His mother having died when he was only six, and his paternal grandfather two years later, he was brought up from the age of eight by his paternal uncle, Abu Talih, the father of Ali. The family belonged to the powerful tribe of Koreish. By his wife Khadija the Prophet had two sons both of whom died young, and four daughters of whom one was Fatima.

As a result of the Prophet's condemnation of the paganism then prevalent in Arabia he was driven out of Mecca and took refuge among his followers at Medina. The Hegira or flight from Mecca (A.D. 622) marks the beginning of the Mahomedan era, for Mahomed rallied his followers and defeated the Meccans in the battle of Badr (A.D. 623). After this victory the Prophet in a few years established absolute supremacy, both temporal and spiritual, in Arabia. The jurisdiction he exercised was both regal and sacerdotal, for he was deemed to be the interpreter of God's will upon earth.

Mahomed died in A.D. 632 and as he left no son the succession of the early Caliphs was not without faction and bloodshed. The first three Caliphs were his disciples and early companions Abu Bakr (A.D. 632), Umar (A.D. 634) and Usman (A.D. 644). Usman was murdered and was succeeded by Ali (A.D. 656), who was cousin and son-in-law of the Prophet having married Mahomed's daughter Fatima. Ali was murdered (A.D. 661) and his place was taken by his son Hasan. Hasan resigned in favour of Muavia, a usurper from Damascus; but was nevertheless also murdered. The partisans of Ali persuaded Hasan's brother Husain to revolt against Muavia. But Husain fell in an ambush at Kerbala where he died fighting with desperate courage against overwhelming odds (A.D. 680).

According to the Shias these disturbances were due to Ayesha, one of the widows of Mahomed: Ali should have been the first Caliph but Ayesha procured the election of her father Abu Bakr and also instigated the murder of Hasan and the usurpation of Muavia. The Shias regard the first three Caliphs as usurpers. They maintain that the Caliphate is hereditary and vested in Ali and his descendants; and they reject the Sunni doctrine that the succession depends upon degree of sanctity as determined by the votes of the faithful.

The death of Husain at Kerbala made the breach between the Sunnis and the Shias irreparable; but it confirmed Muavia upon the throne. Muavia was the founder of the Dynasty of the Omeiyades who ruled at Damascus from A.D. 661 to 750. The Omeiyades were succeeded by the house of Abbas. The Abbasides fixed their Capital at Bagdad and reigned there for five centuries until they were supplanted by the Othman Turks who ruled at Constantinople. In A.D. 1538 the Sultan of Turkey assumed the title of Caliph. The Caliphate was eventually abolished by Mustapha Kemal Pasha in 1924.

Under the reign of the Abbasides the military ardour of the faithful had abated and there was a revival of learning. The Abbasides brought to their court at Bagdad the sages of the law from Kufa and Medina in the holy land of the Hejaz. It was at this time that the law became the subject of scientific and philosophic study and that the principles of the Mahomedan law were settled. The characteristic feature of that law is that it rests upon divine revelation. The Koran is the word of God, and as the precepts and usages of Mahomed were inspired by God, they also have the force of law. Again as the learned are best able to interpret the Koran, a consensus of jurists has legislative authority. Any point not covered by the Koran, or by tradition as to the precepts and usages of Mahomed, or by a consensus of jurists, is solved by a process of analogical deduction from what is there laid down.

The sources of Mahomedan law are therefore:—

1. The Koran.
2. Sunna or tradition as to the precepts and usages of the Prophet.

3. Ijmaa or the consensus of jurists.

4. Kiyas or analogical deduction.

The jurists who developed this system of jurisprudence and after whom the four Schools of Mahomedan law are named are:—

1. Abu Hanifa (A.D. 701 to 795) with his two disciples Abu Yusuf and Imam Mahomed.

2. Malik Ibn Anas (A.D. 718 to 795).

3. Muhammad ash-Shafei (A.D. 768 to 827).

4. Ahmed bin Hanbal (A.D. 813 to 833).

The main principles of the law as expounded by these jurists are the same but there are minor differences. These are in the application of private judgment and in the interpretation of the Koran. Abu Hanifa was known as the upholder of private judgment. He relied more on analogical deduction and the consensus of jurists and not only excluded many traditions but introduced a doctrine of equity called *istihsan* to mitigate the rigour of the traditional law. His system of law is known as the Hanafi law and it attained prominence as it was enforced by his disciple Abu Yusuf who was Chief Kazi of Bagdad. Abu Yusuf relied more upon tradition than Abu Hanifa and cited tradition to justify conclusions arrived at by analogical deduction. Malik Ibn Anas, the founder of the Maliki school, was essentially a traditionist but allowed the exercise of private judgment where tradition failed. Muhammad ash-Shafei gave his name to the Shafei school of law. He relied more upon tradition than Abu Hanifa but less than Malik. The fourth and latest of the jurists Ahmed bin Hanbal was a saintly reactionary and his teaching was characterized by blind reliance on tradition.

Within a hundred years of the Hegira the power of Islam had spread from India in the East to Spain in the West. The Hanafi school prevails in Northern India, Arabia, Syria, Turkey and Egypt; and the Maliki school in Northern Africa, Morocco and Spain. The Shafei school has followers in Southern India and Cairo; and the Hanbal school a few in Arabia. These four schools are the schools of the orthodox or Sunni law so called because it is based on Sunna or tradition.

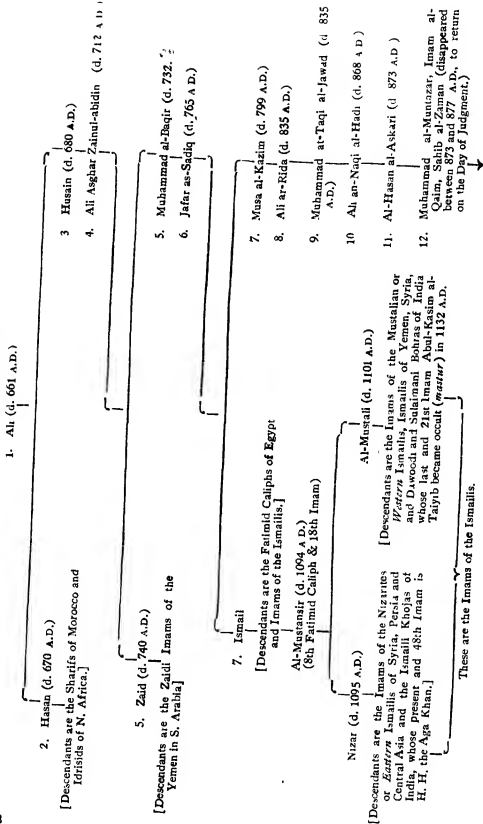
The Shias however did not recognize any tradition that was not derived from the house of Ali. They set up rival Caliphates in Syria, Egypt and Northern Africa. The Fatimid Caliphs reigned in Egypt from A.D. 909 to 1161; while in Persia *Shia-ism* was recognized as the State religion in 1499.

The Shias are divided into numerous sub-sects, as different descendants of Ali were recognized as Imams in different countries. This will appear from the Table of Shia Imams printed at p. ix. The first Imam was Ali. The second was Hasan whose descendants are the Sharifs of Morocco and Idrisids of Northern Africa. The fourth Imam Ali Asghar left two sons Zaid and Muhammad al-Baqir. Zaid's descendants were the Zaidi Imams recognized as such by Shias in the Yemen in South Arabia. But his brother Muhammad al-Baqir was also recognized as fifth Imam and there was later another split in the sect, some recognizing Musa al-Kazim and others Ismail, as Imam. The last descendant of Musa al-Kazim and twelfth Imam was Muhammad al-Muntazar who disappeared between A.D. 873 and 877 and will return on the day of judgment. His followers are called "twelvers," as they recognize twelve Imams. They are the Ithna Asharis, the largest of the Shia sects. The followers of Ismail are known as Ismailis and are also called the "seveners," as Ismail was the seventh Imam. The 10th Imam of the Ismailis was the first Fatimid Caliph of Egypt. The 18th Imam was the 8th Fatimid Caliph Al-Mustansir; and after his death the Ismaili sect split into two sub-sects, some recognizing as Imam Al-Mustali the 9th Fatimid Caliph while others followed his brother Nizar. The followers of Al-Mustali and his descendants are the Western Ismailis of Yemen and Syria and include the Dawoodi Bohras of India. Their last and 21st Imam was Abul-Kasim al-Taiyib who became occult in A.D. 1132. His descendants are believed to exist but have not yet been discovered. The followers of Nizar and his descendants are the Nizarites of Syria, Persia and Central Asia. The Ismaili Khojas of India belong to this sub-sect and their 48th and present Imam is H. H. the Aga Khan.

The religious doctrines of the Shias and their interpretation of the Koran differ in many respects from those of the Sunnis. Shia law therefore differs in some respects from Sunni law.

# Imams of the Shias.

B





### CORRIGENDUM.

*p. 4, last line.*—Delete the following words:—

“So also is the custom of polyandry which”.

*p. 5, lines 1 and 2.*—Delete the following words:—

“prevails among the Moplas in Madras, for this is directly opposed to Mahomedan law.”

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# PRINCIPLES OF MAHOMEDAN LAW.

## CHAPTER I.

### INTRODUCTION OF MAHOMEDAN LAW INTO BRITISH INDIA.

1. **Administration of Mahomedan law.**—The Mahomedan law is applied by Courts in British India to Mahomedans not in all, but in some matters only. The power of Courts to apply Mahomedan law to Mahomedans is derived from and regulated partly by Statutes of the Imperial Parliament but mostly by Indian legislation (*a*). Ch. I,  
Ss. 1-3

For Statutes, see sec. 6; for Acts, see secs. 5A and 7 to 13.

2. **Extent of application.**—As regards British India, the rules of Mahomedan law fall under three divisions, namely:—

- (i) those which have been *expressly* directed by the Legislature to be applied to Mahomedans, such as rules of Succession and Inheritance;
- (ii) those which are applied to Mahomedans as a matter of *justice, equity and good conscience*, such as the rules of the Mahomedan law of Pre-emption;
- (iii) those which are not applied at all, though the parties are Mahomedans, such as the Mahomedan Criminal Law, and the Mahomedan law of Evidence.

The only parts of Mahomedan law that are applied by Courts in British India to Mahomedans are those mentioned in cls. (i) and (ii). In other respects, the Mahomedans in British India are governed by the general law of British India.

3. **Matters expressly enumerated.**—The rules of Mahomedan law that have been *expressly* directed to be applied

(a) *Sheikh Kudratulla v. Mahini Mohan*  
(1869) 4 B.L.R. 134, 169; *Ibrahim*  
*v. Muni* (1870) 6 M.H.O. 26, 31;

*Braja Kishor v. Kirti Chandra*  
(1871) 7 B.L.R. 19, 25.

83. 3-5 to Mahomedans are to be applied except in so far as they have been altered or abolished by legislative enactment.

Thus the rules of the Mahomedan law of Inheritance are *expressly* directed to be applied to Mahomedans. One of those rules is that a Mahomedan renouncing the Mahomedan religion is to be excluded from inheritance. But this rule has now been abolished by the Freedom of Religion Act XXI of 1850. Hence this rule does not apply.

In cases of Hindu or Mahomedan law, it is the duty of the Courts to interpret the law and not to depend upon the opinion of experts however learned (b).

**4. Matters not expressly enumerated.**—No rules of Mahomedan law that have not been expressly directed to be applied to Mahomedans can be applied if they have been excluded either expressly or by implication by legislative enactment.

Thus the rules of the Mahomedan law of Pre-emption are nowhere expressly directed to be applied to Mahomedans. In places where those rules are applied to Mahomedans, they are applied on the ground of justice, equity and good conscience (sec. 178). They are not applied to Mahomedans in Oudh and in the Punjab, for there are *Special Acts* relating to pre-emption for Oudh and the Punjab, and those Acts apply to Mahomedans also (sec. 179).

Again, the rules of the Mahomedan Criminal Law are nowhere expressly directed to be applied to Mahomedans. But there are *legislative enactments* relating to criminal law in India such as the Indian Penal Code and the Code of Criminal Procedure. Hence those rules cannot be applied on grounds of justice, equity and good conscience. The result is that Mahomedans in British India are governed by the criminal law of British India.

The Courts in British India are governed by their own law as to procedure and Mahomedan law dealing with matters purely of procedure is not applicable; *Sabir Hussain v. Ferzand Hasan* (1938) 65 I. A. 119, (1938) All. 314, 173 I.C. 1, ('38) A.P.C. 80.

**5. Justice, equity and good conscience.**—The rules referred to in sec. 2, cl. (ii), may not be applied if they are in the opinion of the Court opposed to justice, equity and good conscience. But the rules referred to in cl. (i) of that section, that is, rules that have been *expressly* directed by the Legislature to be applied to Mahomedans, must be applied though they may not in the opinion of the Court conform with justice, equity and good conscience. See sec. 28A.

Thus the rules of the Mahomedan law of Pre-emption come under sec. 2, cl. (ii), and they are not applied by Courts in the Madras Presidency on the ground that they are *opposed* to justice, equity and good conscience, inasmuch as the law of Pre-emption places restrictions upon the liberty of transfer of property by requiring the owner to sell it in the first instance to his neighbour. The High Courts of Bombay and Allahabad, on the other hand, have applied the Mahomedan law of Pre-emption to Mahomedans, with this remarkable result that

(b) *Shahidganj v. Gurdwara Parbandha Committee* (1940) Lah. 493, 67 I.A. 261, ('40) A. P.C. 116; observations of Sulaiman, J., in *Asis Banu*

*v. Muhammad Ibrahim* ('25) A. A. 720; (1925) 47 All. 823 approved.

the notion of "justice, equity and good conscience" held by those Courts differs from that held by the Madras High Court (c). See sec. 178 below

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Ss. 5, 5A

In the undermentioned case (d) it was *inter alia* held by a single judge of the Calcutta High Court that the rule of the Mahomedan law that, where one of two spouses embraces the Islamic faith, if the other, on its being presented to him does not adopt it, the parties are to be separated, was obsolete and opposed to public policy. See sec. 15 (4) "Conversion to Mahomedanism and martial rights".

As regards rules which the Courts have been *expressly* directed to apply to Mahomedans, they must of course be applied regardless of considerations of justice, equity and good conscience. Thus the rules of the Mahomedan law of Marriage have been expressly directed to be applied to Mahomedans in Bengal, the United Provinces and Assam (sec. 7). One of those rules is that a divorce pronounced by a husband is valid, though pronounced under compulsion (sec. 234). Hence the Courts of British India will not be justified in refusing to recognize such a divorce, though it may be opposed to their notions of justice, equity and good conscience (e).

**5A. Shariat Act. 1937.**—(1) From the 7th October 1937 section 2 of Act XXVI of 1937, in cases where the parties are Muslims, applies the Muslim Personal Law to a number of important matters. The Act operates throughout British India excluding North-West Frontier Province, which has a more far-reaching Act of its own. The section is as follows:

"2. Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including *talaq*, *ila*, *zihar*, *lian*, *khula* and *mubara'at* (f), maintenance, dower, guardianship, gifts, trusts and trust properties, and *wakfs* (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (*Shariat*)."

It is not considered that the Act has the effect of repealing expressly or implicitly any enactment other than those specified in sec. 6. The scope and purpose of sec. 2 is to abrogate custom and usage in so far as these have displaced the rules of Mahomedan law. Customary law as it obtains in the Punjab and elsewhere has been objected to on the ground of uncertainty of the expense of ascertaining it and also in that the rights granted to women thereunder are inadequate and in marked contrast to the fuller rights recognized by the Mahomedan law. That a custom or usage has been recognized by the Courts will not save it; unless it has been embodied in an enactment, it will cease to have effect in respect of the matters mentioned in the section. The word

(c) *Ibrahim v. Muni* (1870) 6 M.H.C. 28.

(d) *Noor Jehan v. Eugene Tuchenko* (1941) 45 C.W.N. 1047, 74 C.L.J. 212,

(41) A.O. 582.

(e) *Ibrahim v. Enayetur* (1869) 4 B.L.R. A.O. 13.

(f) See Ch. XVI *infra*.

**S. 5A** Shariat (*g*) is used in the Act as a synonym for the Mahomedan Personal Law and the use of the word is not thought to import any variation: in particular, the Mahomedan law appropriate to each sect will be applied as mentioned in sec. 21 (*infra*). The exclusion from the subject-matters specified in sec. 2 of the Act, of agricultural land, charities, charitable institutions and charitable and religious endowments, is explained by the fact that these subjects are within the competence of the provincial legislatures. The exception of agricultural land is very important as only a small proportion of the land of India can be excluded from this category, and the law as it stood before the passing of the Act must continue to be applied thereto. The exception is so expressed as to cut down the effect of all the subsequent words, *e.g.*, if the question relates to agricultural land the Mahomedan law is not made the rule of decision in a question regarding gifts. The phrase "where the parties are Muslims" has been taken from the Civil Courts Acts—see *infra*. It may be noted as regards the provinces of Bengal, Agra and Assam that the Act (xii of 1887) made no provision for giving effect to custom in modification of the Mahomedan law and the Allahabad High Court refused to permit custom to be set up in variation of the revealed law (*h*) until in 1912 it was overruled upon the point by the Judicial Committee (1).

The Act does not purport to disturb settled transactions or to displace persons who have lawfully obtained possession in the past. Whether it would be applied in cases which were pending at the commencement of the Act is doubtful.

**Intestate succession.**—Customs altering the Mahomedan law of intestate succession seem to be the chief grievance which the Act is designed to redress. The general rule of customary law is agnate succession which excludes all females except a widow and daughter and these are allowed only a life interest or merely bare maintenance. This custom has the added inconvenience of being subject to many exceptions: *Reg v. Alla Ditta* (1917) 44 Cal. 749, 44 L.A. 89, 38 I.C. 354, 19 Bom.L.R. 388. The custom of agnate succession among Muslims prevails chiefly in Northern India, but in Western India the Act will abolish the customary law of succession according to Hindu law for Khojas, Cutchi Memons, Halai Memons and Sunni Bohras and Molasalam Girasias. In Southern India it will abolish the law of succession of Moplas, many of whom follow the Marumakkattayam law of matriarchal succession. On the other hand as the Act does not by implication repeal any Act not specified in sec. 6, it will not affect the rule of succession by primogeniture enacted for some talukdari and zemindari estates. Nor will the Act affect the custom of succession to the office of Mutawalli of a wakf or Sujjadanishin of a khanka, for charitable and religious institutions are excluded from its scope.

**Special property of females.**—This probably refers to and abolishes a custom whereby property received by a female by inheritance or gift is not her special property but reverts to the heirs of the last male owner: *Muhammad v. Amir* (1889) P.R. 31; *Karm Din v. Umar Baksh* (1888) P.R. 3.

**Mainage.**—The customary law of the Punjab does not recognize the Mahomedan law as to iddat: *Bhagwat Singh v. Mt. Santi* (1919) P.R. 102, 50 I.C. 654. This custom is abolished. So also is the custom of polyandry which

(*g*) The verb means literally begun, led, ordained, instituted, prescribed Hence meanings of the noun include "way to the watering place, the place to be followed, code, divine law, ... might be rendered in English as "The Way". It is a doctrine of duties and has a wider scope than the word "law" suggests. The word *Fiqh* which literally means "intelligence" is used to indicate the science of Muslim law. Both words carry distinct religious implication. A

cording to the Shafi jurists' definition Shariat, which may be translated as the Islamic Code, means "matters which would not have been known but for the communications made us by Rahn. ... ———— dence, p. 50).

(*h*) *Jamnya v. Diwan* (1900) 23 All. 20.  
(1) *Muhammad Ismail v. Lala Shemuka* (1912) 17 Cal.W.N. 97, 15 Bom. L.R. 76, 18 I.O. 57 P.O.

prevails among the Moplas in Madras, for this is directly opposed to Mahomedan law.

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S. 5A

*Dissolution of marriage, maintenance, dower.*—These subjects seem to have been included *ex majori cautela* or because they are specified in sec. 5 of the Punjab Laws Act, 1872. The right of a Muslim wife to obtain a decree for the dissolution of her marriage is now governed by the Dissolution of Muslim Marriages Act, 1939 (see secs. 238A to 239E).

*Guardianship.*—The Act will not affect the provisions of the Indian Majority Act, 1875, or of the Guardian and Wards Act, 1890.

*Gifts, trusts and trust properties and wakfs.*—Gifts may have been included to abolish customs which restrict the power to make gifts to non-agnates. For the same reason trusts and wakfs by way of family settlements are also included. It has been held that the effect of sec. 2 is to make the Mussalman law expressly applicable to wakfs and the subjects enumerated therein which under the terms of previous Acts and Regulations had to be decided on principles of equity and good conscience. But there is nothing in the Shariat Act to affect the decisions of the Privy Council before the Wakf Validating Act of 1930 as those decisions expressly interpreted the Mussalman law in respect of wakfs (j). But it is believed that gifts and family settlements of agricultural land will continue to be subject to customary law where that law has hitherto applied. In cases not affected by the exceptions to sec. 2 of the Act the Mahomedan law of gifts will now be applicable as such and not as the rule of justice, equity and good conscience. This will obviate the difficulty which was felt in the undernoted case (k) as regards applying sec. 129 of the Transfer of Property Act. Public endowments are the subject of a number of enactments. See sec. 176, *infra*.

(2) Sec. 3 (1) of the Shariat Act is as follows:—

“Any person who satisfies the prescribed authority—

(a) that he is a Muslim, and

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872, and

(c) that he is a resident of British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this the provisions of this section (k1), and thereafter the provisions of section 2 shall apply to the declarant and all his minor children and their descendants as if in addition to the matters enumerated therein adoption, wills and legacies were also specified.”

*Section 3 refers to adoption, wills and legacies.*—These cases depend not on the religion “of the parties” but on that of the individual whose family law is

(j) *Mohiuddin Ahmed v. Sofa Khatun* (1940) 2 Cal 464, 44 C.W.N. 974, 192 I.C. 693, (40) A.O. 501.  
(k) *Ma Asha v. B. K. Halder* (1936) 14 Rang. 439, 164 I.C. 984, (36)

A.R. 430.

(k1) Amended by sec. 2 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943.



**S. 5A** in question, i.e., the testator. Customs on these subjects which contravene the Mahomedan law are not invalidated; but any person affected may abandon the custom and adopt the Mahomedan law. Adoption is not recognized by Mahomedan law but there is a custom of a sort of adoption in the Punjab which is said to be the nomination of an heir: *Nur Muhammad v. Bhawan Shah* (1936) 17 Lah. 96, 162 I.C. 854, ('36) A.L. 465. Again in Sind a custom of adoption was set up by a tribe which was originally Hindu: *Usman v. Asat* ('25) A.S. 209. There is a custom in derogation of the Mahomedan law as to wills in the Punjab: *Rahim Baksh v. Umar Din* (1915) P.R. 9. In Bombay the Khojās can under their customary law dispose of the whole of their property by will. Until the passing of the Cutchi Memons Act X of 1938 the Cutchi Memons also could dispose of the whole of their property by will. Now, however, even with regard to testate succession they are governed by Mahomedan law (see sec. 16). Section 2 of the Shariat Act is said to be "coercive" while section 3 is said to be "persuasive." The power given by this section will in some cases meet the difficulty illustrated by the undernoted case (1) where an attempt to give up custom in favour of Mahomedan law was held to fail.

(3) Section 5 of the Shariat Act which has been repealed by section 6 of the Dissolution of Muslim Marriages Act, 1939, was as follows:—

"5. The District Judge may, on petition made by a Muslim married woman, dissolve a marriage on any ground recognized by Muslim Personal Law (*Shariat*)."

Section 5 of the Shariat Act in effect overruled the decision of the Calcutta High Court in *Burhan Mirza v. Mt. Khodeja Bibi* (1937) 2 Cal. 79, 41 Cal. W.N. 314, 65 Cal L.J. 21, 168 I.C. 639, ('37) A.C. 189, that a suit for dissolution of marriage should be filed before a Munsiff or the Court of the lowest jurisdiction competent to try it, and confirmed the practice to file such suits in the District Court. Now that section 5 has been repealed by section 5 of the Dissolution of Muslim Marriages Act, 1939, the authority of this case has been revived, and a suit for dissolution will have to be filed under the provisions of the Civil Procedure Code, 1908, that is, in the Court of the lowest jurisdiction competent to try it. For the provisions of the Dissolution of Muslim Marriages Act VIII of 1939 see secs. 238A to 239E.

(4) Section 6 of the Shariat Act is as follows:—

"The undermentioned provisions (11) of the Acts and Regulations mentioned below shall be repealed in so far as they are inconsistent with the provisions of this Act, namely:—

(1) Section 26 of the Bombay Regulation IV of 1827;

(2) Section 16 of the Madras Civil Courts Act, 1873;

(1) *Sardar Bibi v. Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.C. 575, ('34) A.L. 871.

(11) Amended by sec. 3 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943.

- (3) For the purpose of reviving the operation of section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887, entry (3) has been omitted by section 3 of the Muslim Personal Law (Shariat) Application (Amendment) Act, 1943; Ch. I,  
Ss. 5A, 6
- (4) Section 3 of the Oudh Laws Act, 1876;
- (5) Section 5 of the Punjab Laws Act, 1872;
- (6) Section 5 of the Central Provinces Laws Act, 1875; and
- (7) Section 4 of the Ajmere Laws Regulation, 1877."

*Section 6.*—It will be noticed that the Civil Courts Acts or their equivalent in the various provinces are only repealed *sub modo*—in effect only in so far as they permit custom to override the Mahomedan law in cases where the parties are Muslims and the question is one regarding the matters specified in secs. 2 and 3 of the Act. It is, therefore, still necessary to consider the various Acts in detail.

**6. Mahomedan law in Presidency-towns.**—(1) As to the Presidency-towns of Calcutta, Madras and Bombay, sec. 223 of the Government of India Act, 1935 (26 Geo. V c. 2) enacts that the law to be administered shall be the same as before the commencement of Part III of the Act. That is the law in sec. 112 of the Government of India Act, 1915 (5 & 6 Geo. V c. 61) which is as follows:—

"The High Courts at Calcutta, Madras and Bombay, in the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras or Bombay, as the case may be, shall, in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties are subject to the same personal law or custom having the force of law, decide according to that personal law or custom, and, when the parties are subject to different personal laws or customs having the force of law, decide according to the law or custom to which the defendant is subject."

The effect of this section is that the law to be applied in the matters aforesaid is the Mahomedan law if both parties are Mahomedans. Similarly, when a dealing takes place between two parties of whom one is a Hindu and the other a Mahomedan, and a suit is brought in respect of that dealing by the Hindu against the Mahomedan, the dispute between

- S. 6** them is to be decided according to the Mahomedan law (*m*). But that law cannot be applied in either case if it has been altered or abolished by legislative enactment [see notes below].

(2) The law to be applied by the Presidency Small Cause Courts is the same as that administered for the time being by the High Courts in the exercise of their ordinary original civil jurisdiction; see Presidency Small Cause Courts Act XV of 1882, sec. 16.

*Custom.*—Most customs have been abolished by the Shariat Act, 1937.

*Earlier statutes.*—Provisions similar to those in sub-sec. (1) were contained in the East India Company Act, 1870, sec. 17 [21 Geo. 3, ch. 70], which applied to the Supreme Court at Calcutta, and the East India Act, 1797, sec. 13 [37 Geo. 3, ch. 142], which applied to the Recorder's Courts at Madras and Bombay. These Acts as well as the High Courts Acts of 1861, 1865 and 1911 have been repealed and re-enacted by the Government of India Act of 1915. But the repeal does not affect the validity of any charter or letters patent under those Acts [Government of India Act, 1915, sec. 130].

*Law to be administered in cases of inheritance, succession, contract and dealing between party and party.*—The law as enacted in sec. 112 of the Government of India Act, was subject to alteration by the Indian Legislature. This was so enacted in sec. 131 of that Act (replacing sec. 22 of the India Councils Act, 1861) and is now enacted in sec. 223 of the Government of India Act, 1935. In fact the Mahomedan law of contract has been almost entirely superseded by the Indian Contract Act, 1872, and other enactments, and this was done in the exercise of the power given to the Governor-General in Council by the Indian Councils Act, 1861. (The latter Act has been repealed and to a large extent re-enacted by the Government of India Act of 1915 (*n*). As regards interest, it is doubtful whether the Mussalman rule prohibiting usury has been repealed by the Usury Laws Repeal Act 28 of 1855 (*o*). The point arose in a Privy Council case, but it was not decided (*p*). See sec. 65 of the Government of India Act of 1915, and cls. 19 and 44 of the letters patent of the High Courts for Calcutta, Madras and Bombay.

*Law to which the defendant is subject.*—It is provided by the latter portion of sec. 112 of the Government of India Act of 1915, that when the parties are subject to different personal laws, the dispute between them is to be decided according to the law to which the defendant is subject. But these words do not mean this, that where a Hindu purchases land from a European which is subject to his wife's claim for dower, and a suit is brought by the wife against the Hindu purchaser to enforce her right, the Hindu purchaser can resist her claim on the ground that the Hindu law does not recognize dower. The Hindu purchaser is in no better position than a European purchaser would be, simply because the Hindu law recognizes no rule of dower (*q*).

- (*m*) *Azim Un-Nissa v. Dale* (1871) 6 Mad. H.C. 455, 475; West and Buhler's Digest of Hindu Law, p. 6.  
 (*n*) See *Madhub Chunder v. Rajcoomar* (1874) 14 B.L.R. 76; *Nobin Chunder v. Romesh Chunder* (1887) 14 Cal. 781.  
 (*o*) *Ram Lal v. Haran Chandra* (1869) 3 B.L.R. (O.C.) 150, 154 [not abrogated]; *Mia Khan v. Bibiyan* (1870) 5 B.L.R. 590 [abrogated].  
 (*p*) *Hamira Bibi v. Zubaida Bibi* (1916)

- 43 I.A. 294, 300, 38 All. 581, 587, 588, 36 I.C. 87.  
 (*q*) *Sarkies v. Protonomayes* (1881) 6 Cal. 794, 805-806 [21 Geo. 3, Ch. 70, s. 17.] See also *Azim Un-Nissa v. Dale* (1871) 6 Mad.H.C. 455, 474-475 [37 Geo. 3, Ch. 142, s. 13]; *Lakshmandas v. Duerst* (1890) 6 Bom. 168, 183-184; *Mahomed v. Narayan* (1916) 40 Bom. 358, 368, 32 I.C. 939.

7. In Bengal, Bihar, Agra and Assam.—As to these territories except such portions of those territories as for the time being are not subject to the ordinary civil jurisdiction of the High Courts, it is enacted that the Civil Courts of those Provinces shall decide all questions relating to “succession, inheritance, marriage or any religious usage or institution,” by the Mahomedan law in cases where the parties are Mahomedans, except in so far as such law has, by legislative enactment, been altered or abolished. In cases not mentioned above nor provided for by any other law for the time being in force the decision is to be according to justice, equity and good conscience.

This is the substance of the Bengal, Agra and Assam Civil Courts Act XII of 1837, sec. 37, as amended with the Bengal and Assam Laws Act, 1905, secs. 2 and 3.

*Law after the Shariat Act, 1937.*—The Shariat Act, 1937, which invalidates customs in derogation of the Mahomedan law had by sec. 6 (3) repealed this section so far as it was inconsistent with its provisions. The section makes no reference to custom, but it had been construed by the Privy Council as subject to proof of family custom at variance with the Mahomedan law (r). This construction of the section is no longer admissible except as to customs (e.g., affecting agricultural land) to which the Act does not apply. Section 37 of the Bengal, Agra and Assam Civil Courts Act is in no way inconsistent with the provisions of the Shariat Act, and therefore subsec. (3) of sec. 6 of that Act was not necessary. Sub-sec. (3) has, therefore, been omitted by the Amending Act XVI of 1943. See sec. 5A, *supra*.

*Law before the Shariat Act, 1937.*—The section makes no reference to custom and in an old Allahabad case it was construed as excluding evidence of custom (s). But since the decision of the Privy Council referred to in the last paragraph it was construed as subject to proof of family custom in supersession of the Mahomedan law (t). The custom must be ancient and reasonable and the burden of proof lies upon the party who sets up the custom (u). It may be proved by instances or by the *wajib-ul-arz* or *riwaz-i-am* but cannot be enlarged by parity of reasoning (v). As to the evidentiary value of a *wajib-ul-arz* (w) or *riwaz-i-am* (x) see the undermentioned cases.

*Justice, equity and good conscience.*—For the previous history of this provision cf. Field's Regulations of the Bengal Code, pp. 109-117.

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| <p>(r) <i>Muhammad Ismail v. Lala Sheemukh</i> (1913) 15 Bom.L.R. 78, 17 Cal. W.N. 97, 18 I.C. 571 F.C.</p> <p>(s) <i>Jammya v. Divan</i> (1900) 23 All. 20.</p> <p>(t) <i>Ah Asghar v. Collector of Bulandshahr</i> (1917) 39 All. 574, 40 I.C. 753; <i>Mt. Jafro v. Chatta</i> (1936) All.L.J. 495, 163 I.C. 850, ('36) A.A. 443; <i>Roshan Ali Khan v. Chaudhri Asghar Ali</i> (1930) 57 I.A. 29, 5 Luck. 70, 121 I.C. 517, ('30) P.O. 35 (an Oudh case).</p> <p>(u) <i>Abdul Hussein v. Sona Dero</i> (1918) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306 approving <i>Daya Ram v. Soheli Singh</i> (1906) P.R. 110.</p> <p>(v) <i>Muharram Ali v. Barkat Ali</i> (1931) 12 Lah. 286, 125 I.C. 886, ('30) A.L. 695.</p> | <p>(w) <i>Uman Parashad v. Gandharp Singh</i>, (1887) 14 I.A. 127; <i>Balagobind v. Radri Prasad</i> (1923) 50 I.A. 196, 45 All. 413, 74 I.C. 449, ('23) A.P.C. 70, <i>Roshan Ali Khan v. Chaudhri Asghar Ali</i>, <i>supra</i>.</p> <p>(x) <i>Beg v. Allah Ditta</i> (1917) 44 I.A. 89, 44 Cal. 749, 38 I.C. 354; <i>Abdus Subhan</i> (1925) 52 Cal. 2, 91 I.C. 455, <i>Vaishno Ditti v. Rameshri</i> (1928) 55 I.A. 407, 10 Lah. 86, 113 I.C. 1, 49 O.L. J. 38, ('28) A.P.O. 294; <i>Kunwar Basant Singh v. Kunwar Brij Raj Saran Singh</i> (1935) 62 I.A. 180, 195, 57 All. 494, 156 I.C. 864, ('35) A.P.O. 192.</p> |
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## Ss. 7-9

On a question whether a Hindu talukdar was bound to pay a debt contracted by his guardian on his account it was said by Lord Hobhouse:—"In point of fact, the matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances. Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India" (y). In the case of a Muslim lady's transfer for consideration with a partial restraint on alienation Sir George Lowndes referred to this passage and held the restraint was valid though not in exclusive reliance upon English law (z). On the other hand the Mahomedan law is applied in cases of pre-emption as the rule of justice, equity and good conscience—see Chapter XIII below. Again in cases of gift in provinces where the Legislature has not expressly applied the Mahomedan law to gifts that law has been resorted to as regards gifts made by Muslims both before (a) and after (b) the Transfer of Property Act took effect. This application of Mahomedan law can only be put upon the ground of justice, equity and good conscience (c); though at one time a contrary opinion was entertained by individual judges (d).

**8 In the Mufassal of Madras.**—As to the Mufassal of Madras, it is enacted by the Madras Civil Courts Act III of 1873, sec. 16, that all questions regarding "succession, inheritance, marriage, . . . or any religious usage or institution" shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law or by custom having the force of law, and in cases where no specific rule exists, the Courts shall act according to justice, equity and good conscience.

*Law after the Shariat Act, 1937.*—The provisions of this section as to custom have been repealed by the Shariat Act, 1937, so far as they are inconsistent with that Act. The repeal does not affect agricultural land or any other matter to which the Shariat Act does not apply. See sec. 5A.

*Law before the Shariat Act, 1937.*—Before the Shariat Act the section was applied in a Madras case in which a custom excluding females of the Lubbai Mahomedans of Coimbatore was held not proved (e).

*Justice, equity and good conscience.*—See notes to sec. 7 above.

**9. In the Mufassal of Bombay.**—As to the Mufassal of Bombay, it is enacted by Regulation IV of 1827, sec. 26, that "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case; in the absence of such Acts and Regulations, the

(v) *Waghela v. Shekh Mashudin* (1887) 11 Bom. 551, 561, 14 I. A. 89, 96.

(z) *Muhammad Raza v. Abbas Bandi Bibi* (1932) 59 I. A. 236, 137 I. O. 321, (32) A. P. C. 138.

(a) *Kamar-Un-Nisra Bibi v. Hussaini Bibi* (1880) 3 All. 266, *Mogulsha v. Mahammad Sahib* (1887) 11 Bom. 517; *Mahomed Buksh Khan v. Hosseini Bibi* (1888) 15 Cal. 684.

(b) *Koram Ilahi v. Sharf-ud-din* (1916) 38 All. 212, 35 I. C. 14; *Bava Sahib v. Mahomed* (1896) 19 Mad. 343; *Yahazulshah Sahib v. Baysapati Nagayya* (1907) 30 Mad. 519; *Nasib Ali v. Wajed Ali* (1927) 44 Cal. L. J.

490, 100 I. C. 296, (27) A. C. 197, *Sultan Miya v. Ajibkhatoon Bibi* (1932) 59 Cal. 557, 138 I. C. 733, (32) A. C. 497.

(c) Cf. *Alabi Koya v. Mussa Koya* (1901) 24 Mad. 519 and *Yahazulshah Sahib v. Baysapati Nagayya* (1907) 30 Mad. 519 where the principle was fully discussed though with different results.

(d) Cf. *Gobind Dayal v. Inayatullah* (1885) 7 All. 775.

(e) *Muhammad v. Shaikh Ibrahim* (1922) 49 I. A. 119, 45 Mad. 308, 67 I. C. 115, (22) A. P. C. 59.

usage of the country in which the suit arose; if none such appears, the law of the defendant, and in the absence of specific law and usage, justice, equity and good conscience alone.”

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Not a single topic of Mahomedan law is expressly mentioned in this section. The Mahomedan law that is applied to Mahomedans by Courts in the Mufassal of Bombay is applied presumably as the law of the defendant (f).

*Law after the Shariat Act, 1937.*—The provisions of this section of the Regulation have been repealed so far as inconsistent with that Act by the Shariat Act, 1937. Evidence of usage of the country is therefore inadmissible to prove a custom contrary to the Mahomedan law, unless in respect of agricultural land or other matter outside the Act. See sec. 5A.

*Law before the Shariat Act, 1937.*—Before the Shariat Act it was held that though usage is mentioned in the Regulation before the law of the defendant there is no presumption in favour of custom. It must be proved that the matter is governed by custom and not by personal law. Evidence may be given under this section of a custom excluding women from any share in the inheritance of a paternal relation (g). The High Court of Bombay gave effect to a usage prevailing in the Presidency of performing rites and ceremonies at the graves of deceased Mahomedans, and granted an injunction at the suit of the Mahomedan residents of Dharwar restraining the purchaser of a graveyard from obstructing them in performing religious ceremonies at the graveyard (h).

**10 In the Punjab.**—As to the Punjab it is enacted by the Punjab Laws Act IV of 1872, secs. 5 and 6, as follows:—

“5. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions or any religious usage or institution, the rule of decision shall be—

- (1) any custom applicable to the parties concerned which is not contrary to justice, equity or good conscience, and has not been, by this or any other enactment, altered or abolished, and has not been declared to be void by any competent authority;
- (2) the Mahomedan law, in cases where the parties are Mahomedans, . . . . except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of the Act, or has been modified by any such custom as is above referred to.

“6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.”

(f) See *Musa Miya v. Kadar Buz* (1928) 55 T.A. 171, 52 Bom. 316, 109 I. C. 31, (28) A.P.C. 108 explained in *Ma Acha v. B. K. Haladar* (1936) 14 Rang. 439, 164 I.

C. 964, (36) A.R. 430.  
(g) *Abdul Hussain v. Sona Dero* (1918) 45 Cal. 450, 45 I.A. 10, 43 I.C. 306.  
(h) *Ramrao v. Rustumkhan* (1901) 26 Bom. 198.

**S. 10** *Law after the Shariat Act, 1937.*—The Shariat Act repeals sec. 5 of the Punjab Laws Act, 1872, in so far as it is inconsistent with its provisions. Evidence of custom contrary to the Mahomedan law is therefore not admissible on questions of succession, special property of females, marriage, divorce, dower, adoption, guardianship and gifts. As to agricultural land the law remains as declared in the Punjab Act. See sec. 5A. In the matter of wills and legacies a Mahomedan is given by sec. 3 of the Shariat Act the option of remaining under the customary law or of adopting the Mahomedan law.

*Law before the Shariat Act, 1937*—Before the Shariat Act evidence was admissible to prove a custom contrary to the Mahomedan law. This will appear from the four following paragraphs:

*Custom.*—This subject was considered by the Judicial Committee under these enactments in *Abdul Hussein v. Sona Dero* (i) and *Vaishno Ditt v. Rameshri* (j). In the latter case it was said: "In putting custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established, as it necessarily must be, the Legislature intended to recognise the fact that in this part of India, inheritance and other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mahomedan law. In these circumstances it has been rightly held in the Lahore Court [*Daya Ram v. Soheli Singh*, (1906) P.R. 110] that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom."

*Abrogation of custom.*—The abrogation of custom in favour of Mahomedan law may be inferred from a continuous course of conduct. But an individual cannot by a mere declaration abolish a long established custom (k).

*Invalid custom.*—"As regards Mahomedans, prostitution is not looked on by their religion or their laws with any more favourable eye than by the Christian religion and laws." Accordingly the Chief Court of the Punjab refused to recognize a custom of the Kachans which aimed at the continuance of prostitution as a family business, and the decision was upheld by the Privy Council on appeal (l). See notes to sec. 7 above.

*Custom of succession.*—The ordinary rules of Mahomedan law may be varied by proof that succession in a particular family is regulated by the custom of *strabant* (m) according to which the sons of each wife fall into a separate group, each group taking an equal share. But this does not necessarily involve that in cases of collateral succession arising in respect of a property so obtained from a common ancestor the full blood excludes the half blood, nor that the sons of each wife and their descendants are constituted separate stocks for purposes of inheritance, and in any case the custom of *strabant* has no application to a case where the choice of heirs lies between persons of different degrees. The general law must apply except in so far as the custom alters it (n).

But in the Punjab customary law there is a distinction between the *Pagwand* and *Chundawand* (o) customs: under the former the division among sons is *per capita* and each son takes an equal share: under the latter the sons of each wife divide an equal share (as in the *strabant* custom above-mentioned). In these Punjab customs however is involved the principle that the portion allotted to a group should belong as an entirety to the members who for the time being form or represent the group until the group is extinct. This means in effect that the

(i) (1917) 45 I.A. 10, 45 Cal. 450, 43 I.C. 306.  
(j) (1928) 55 I.A. 407, 421, 10 Lah. 86, 113 I.O. 1, 49 Cal.L.J. 38, (23) A.P.O. 224.  
(k) *Sardar Bahi v. Haq Nawaz Khan* (1934) 15 Lah. 425, 149 I.O. 575, (34) A.L. 371; *Rajkuhen Singh v. Ramjoy Mazoomdar* (1872) 1 Cal.

186 P.O.  
(l) *Ghasiti v. Umrao Jan* (1898) 21 Cal. 149, 158, 20 I.A. 193.  
(m) From stril, a woman.  
(n) *Karamat Ali v. Saadat Ali* (1933) 8 Luck. 228, 141 I.O. 27, (33) A.O. 4.  
(o) From chunda the knot of hair on a woman's head.

half blood cannot compete with the whole blood. Even if the property of the common ancestor was distributed on the Pagwand system, separate possession of a specific portion having been held by the sons of one wife, the Pagwand rule though it applies is to be applied within the family of that wife's children (p).

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*Justice, equity and good conscience.*—See notes to sec. 7 above.

**10A. In Ajmer-Merwara.**—The provisions of the Ajmer-Merwara Laws, Regulation III of 1877, secs. 4 and 5, are almost to the same effect as the Punjab Laws Act IV of 1872 [sec. 10 above].

*Shariat Act, 1937.*—The Shariat Act repeals sec. 4 of the Ajmere Laws Regulation, 1877, in so far as it is inconsistent with its provisions. It affects the law under the Regulation in the same way as in the Punjab. See sec. 10, *supra*.

**11. In Oudh.**—The provisions of the Oudh Laws Act XVIII of 1876, sec. 3, as regards the law to be administered in the case of Mahomedans are the same as in the Punjab.

*Shariat Act, 1937.*—The Shariat Act repeals sec. 3 of the Oudh Laws Act in so far as it is inconsistent with its provisions. It affects the law in Oudh in the same way as in the Punjab. See sec. 10, *supra*. A case decided under section 3 before the Shariat Act is *Roshan Ali Khan v. Chaudhri Asghar Ali* (q).

**11A. In the North West Frontier Province.**—As to this province sec. 27 of the N.-W. Frontier Law and Justice Regulation (VII of 1901) is the same as sec. 5 of the Punjab Act and sec. 28 of the Regulation is the same as sec. 6 of the Punjab Act.

*Custom.*—Under sec. 27 the Mahomedan law gave way to custom in the same way as in the Punjab. See sec. 10, *supra*. But sec. 27 was repealed, absolutely and not merely *sub modo*, by the North-West Frontier Province Muslim Personal Law (Shariat) Application Act (VI of 1935) so far as Muslims are concerned. The law for the Province is enacted in sec. 2 which is as follows:

“2. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage or institution including Waqf (trust and trust property), the rule of decision shall be the Muslim Personal Law (Shariat) in cases, where the parties are Muslims.

Except in so far as such law has been altered or abolished by legislative enactments or is opposed to the provisions of the North-West Frontier Province Law and Justice Regulation, 1901.”

(p) *Nabi Baksh v. Ahmad Khan* (1924) 51 I.A. 199, 5 Luck. 278, 80 I.C. 158, ('24) A.P.C. 117. (q) (1930) 57 I.A. 29, 5 Luck. 70, 121 I.C. 517, ('80) A.P.C. 35.



**Ss.** The second clause of the section expressly enacts what is assumed in the  
**11A-12A** *Shariat Act, 1937*, that no enactment of the Legislature will be affected. The Provincial Act is far more drastic than the Imperial Act for (s) it applies to agricultural land, (u) it does not exclude charities, charitable institutions and charitable and religious endowments, (m) it includes betrothal and bastardy, and (w) it applies the 'coercive' process instead of the "persuasive" process to wills and legacies. The Act came into force on the 6th December, 1935.

**12.** In the Central Provinces and Berar.—As to the Central Provinces, it is enacted by the Central Provinces Laws Act XX of 1875, sec. 5, as follows:—

"In questions regarding inheritance, . . . betrothal, marriage, dower, . . . guardianship, minority, bastardy, family relations, wills, legacies, gifts, partitions, or any religious usage or institution, the rule of decision shall be the Mahomedan law in cases where the parties are Mahomedans . . . except in so far as such law has been by legislative enactment altered or abolished, or is opposed to the provisions of this Act:

"Provided that, when among any class or body of persons or among the members of any family any *custom* prevails which is inconsistent with the law applicable between such persons under this section, and which, if not inconsistent with such law, would have been given effect to as legally binding such custom shall, notwithstanding anything herein contained, be given effect to.

"In cases not provided for [by the above clause], or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience."

*Shariat Act, 1937.*—The *Shariat Act, 1937*, repeals sec. 5 of the Central Provinces Laws Act, 1875, in so far as its provisions are inconsistent with it. It affects the law in the Central Provinces in the same way as in the Punjab. See sec. 10.

*Justice, equity and good conscience*—See notes to sec. 7 above. See also secs. 5 and 28A.

**12A.** In Sind and Orissa.—By section 289 of the Government of India Act, 1935, establishing Sind and Orissa as new provinces it was provided [sub-sec. 2 (c)] that an Order in Council might contain (*inter alia*):—

(c) such provisions with respect to the laws which subject to amendment or repeal by the Provincial, or as the case may be, the Federal Legislature, are to be in force in, or in any part of, Sind or Orissa respectively, as His Majesty may deem necessary or proper.

The Orders in Council (dated 3rd March 1936 and numbered 1936 No. 164 and No. 165) do not effect any change as regards Mahomedan law.

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Before the creation of this province by the Government of India Act, 1935, Bombay Regulation IV of 1827 applied to Sind and the Bengal, Agra and Assam Civil Courts Act, 1887, to Orissa. The new province is subject to the Shariat Act, 1937.

**13. In Burma.**—As to Burma, it is enacted by the Burma Laws Act XIII of 1898, sec. 13 (1), that all questions regarding succession, inheritance, marriage, or any religious usage or institution, shall be decided, in cases where the parties are Mahomedans, by the Mahomedan law, except in so far as such law has by enactment been altered or abolished, or is opposed to any *custom* having the force of law. Sec. 13 (2) requires that subject to the provisions of subsection (1) all questions in civil suits instituted in the Civil Courts of Rangoon shall be dealt with and determined according to the law administered in the original civil jurisdiction of the High Court of Calcutta, *i.e.*, by the law of the defendant (*r*). In cases not specifically mentioned above nor provided for by any other enactment for the time being in force, the decision is to be according to justice, equity and good conscience.

*Government of India Act, 1935.*—By section 402 the law administered in the High Court of Rangoon is to be the same as immediately before the commencement of Part XIV of the Act.

*Custom.*—As Burma is no longer part of British India the Shariat Act does not apply to Burma. Evidence of custom contrary to the Mahomedan law is therefore admissible.

*Justice, equity and good conscience.*—See notes to sec. 7 above.

**13A. Applicability of Mahomedan law to gifts.**—Apart from the Shariat Act, the effect of the enactments summarized above is to apply the Mahomedan law expressly to gifts in the Punjab, the Central Provinces, the N.-W. Province, Ajmer-Merwara and Oudh. It is also applied as the law of the parties or of the defendant in the Presidency-towns, the Courts of Rangoon and the Mufassal of Bombay. But it has not been applied to gifts in Bengal, Bihar, Agra, Madras, Assam or Burma. Nevertheless as above mentioned (*s*) the Courts of certain of these provinces have,

(*r*) *Rahmat Bibi v. Maung Po Sen* (1936)  
14 Rang. 485, 166 I.C. 327, ('36)  
A.R. 522.

(*s*) See note "Justice, equity and good conscience" under sec. 7, *supra*.

**S. 13A** notwithstanding sec. 123 of the Transfer of Property Act, applied the Mahomedan law to gifts (*t*) as the rule of justice, equity and good conscience, on the view that sec. 129 of the Transfer of Property Act rendered the provisions of sec. 123 inapplicable. A Full Bench of the Rangoon High Court have held that this is an erroneous assumption. The reason for this decision is as follows:—Mahomedan law was applied to gifts in Burma not as a rule of Mahomedan law but as a rule of justice, equity and good conscience; there was therefore no rule of Mahomedan law to be saved by sec. 129; that section does not operate to save a rule of justice, equity and good conscience; therefore sec. 123 applies to gifts in Burma (*u*). The matter has not yet been concluded by a judgment of the Judicial Committee; and it may be contended in support of the older view (and of titles dependent thereon) that the Rangoon High Court have taken too narrowly the words of sec. 129 “affect any rule of Mahomedan law”; and that the statute was not intended to operate differently from province to province upon the Mahomedan law according as that law was applied as being, *e.g.*, the law of the parties or as the rule of conscience applicable to the case. As to the effect of the Shariat Act, see sec. 5A.

Before the Transfer of Property Act was applied to Burma a notification was issued applying in a district of Burma sec. 123 of the Transfer of Property Act alone without also applying sec. 129. The Privy Council assumed that the Mahomedan law applied to gifts in Burma and held that though sec. 129 was not applied that law was not abrogated by the application of sec. 123. The effect attributed to the notification was to super-impose the requirements of sec. 123 as to deed registered and attested upon the Mahomedan law requirement as to delivery of possession (*v*). The notification was superseded by subsequent notifications applying the whole Act to Burma.

(*t*) *Karam Allah v. Sharf-ud-din* (1916) 38 All. 212, 85 I. O. 14; *Bura Sahib v. Mahomed* (1896) 19 Mad. 343; *Vakhsullah Sahib v. Boyapati Nagayya* (1907) 30 Mad. 519, *Nasib Ali v. Wajed Ali* (1927) 44 Cal. L. J. 490, 100 I. O. 296, (27) A. O. 197; *Sultan Muya v. Aybakhatoon Bibi* (1932) 59 Cal. 557, 138 I. O. 753, (32) A. O. 497.  
 (*u*) *Ma Asha v. B. K. Haddar* (1936) 14 Rang. 439, 154 I. O. 964, (36) A. R. 430.  
 (*v*) *Ma Mi v. Kallandar Ammal* (1927)

54 I. A. 23, 5 Rang. 7, 100 I. O. 32, (27) A. P. O. 22. N.B.—In this case there was a registered deed and no question arose as to compliance with sec. 123. But it is thought that the effect of the decision is as stated in the text, though that was doubted by Mosely, J., in 14 Rang. 489, *supra* at p. 445, where the words in brackets (“or rather tried to effect”) appear to have been added to the Privy Council judgment by mistake.

## CHAPTER II.

### CONVERSION TO MAHOMEDANISM.

14. Who is a Mahomedan.—Any person who professes the Mahomedan religion, that is, acknowledges (1) that there is but one God, and (2) that Mahomed is His Prophet, is a Mahomedan (a). Such a person may be a Mahomedan by birth or he may be a Mahomedan by conversion (b). It is not necessary that he should observe any particular rites or ceremonies, or be an orthodox believer in that religion; no Court can test or gauge the sincerity of religious belief (c). It is sufficient if he professes the Mahomedan religion in the sense that he accepts the unity of God and the prophetic character of Mahomed.

"If one of the parents of an infant be a believer, the construction of law is in favour of the Islam of the infant"; Baillie, II, 265 (Shia law); *Hedaya*, 64 (Sunni law). But this presumption may be rebutted by general conduct and surrounding circumstances. Thus an illegitimate son of a Hindu by a Mahomedan woman, who is brought up as a Hindu and married to a Hindu girl in the Hindu form of marriage, may well be regarded as a Hindu, though his mother was a Mahomedan (d).

A person born a Mahomedan remains a Mahomedan until he renounces the Mahomedan religion (e). The mere adoption of some Hindu forms of worship does not amount to such a renunciation (f).

15. Conversion to Mahomedanism and marital rights.—(1) The conversion of a Hindu wife to Mahomedanism does not *ipso facto* dissolve her marriage with her husband. She cannot, therefore, during his lifetime, enter into a valid contract of marriage with any other person. Thus if she, after conversion to Mahomedanism, goes through a ceremony of marriage with a Mahomedan, she will be guilty of bigamy under sec. 494 of the Indian Penal Code (g).

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| <p>(a) <i>Narantakath v Parakkal</i> (1922) 45 Mad. 986, 71 I.C. 65, ('23) A.M. 171 [Ahamedes are not apostates from Islamism]; <i>Hakim Khalid v. Malik Ierof</i> (1917) 2 Pat. L. J. 108, 37 I.C. 302 [Ahamedes are not apostates from Islamism]; <i>Queen-Empress v. Ramsan</i> (1885) 7 All. 461, <i>Ata-Ullah v. Asim-Ullah</i> (1890) 12 All. 494; <i>Jiwan Khan v. Habib</i> (1898) 14 Lah. 518, 144 I.C. 658, ('99) A.L. 759.</p> <p>(b) <i>Abraham v. Abraham</i> (1869) 3 Moo. I.A. 199, 243.</p> | <p>(c) <i>Abdool Razack v. Aga Mahomed</i> (1894) 21 I.A. 58, 64.</p> <p>(d) <i>Bhaya Sher Bahadur v. Bhaya Ganga Bakht Singh</i> (1916) 41 I.A. 1, 36 All. 101, 22 I.C. 298.</p> <p>(e) <i>Bhagwan Baksh v. Drughbhai</i> (1881) 6 Luck. 487, 132 I.C. 770, ('81) A.O. 301.</p> <p>(f) <i>Aruma Bibi v. Munehi Shamalanand</i> (1912) 17 O.W.N. 121, 40 Cal. 378, 17 I.C. 758.</p> <p>(g) <i>Government of Bombay v. Ganga</i> (1897) 4 Bom. 330; <i>In the Matter of Ram Kumari</i> (1891) 18 Cal.</p> |
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(2) In *Skinner v. Orde (h)*, a Christian man, married to a Christian wife, declared himself a Mahomedan, and went through a ceremony of marriage with another woman. The Privy Council agreed with the High Court in thinking that the marriage was of doubtful validity. The Calcutta High Court has held that where an Indian Christian domiciled in India and married to an Indian Christian also domiciled in India embraces the Islamic faith, he may enter into a valid contract of marriage with a Mahomedan woman though the first marriage with the Christian wife subsists (i).

(3) In *Khambatta v. Khambatta (j)* a Mahomedan married a Christian woman in Christian form. The wife became a convert to the Mahomedan religion and the husband divorced her by talak. The Bombay High Court held that on the wife renouncing Christianity the *lex domicilii* applied the law of their religion and that the divorce was valid.

See sec. 237, "Apostasy from Islam and dissolution of marriage."

(4) In *Noor Jehan v. Eugene Tischenko (k)* the parties were Russians who had married in the Christian form. The wife came to India and embraced Islam. The husband refused to embrace the Muslim faith on the wife calling upon him to do so. A single judge of the Calcutta High Court has held that as the parties were domiciled in Russia the British Courts had not jurisdiction to grant divorce but that even if they had, the conversion of the wife to the Muslim faith and the refusal of the husband to embrace that faith were not sufficient grounds for pronouncing a divorce or for declaring that the marriage had been dissolved.

✓ **15A. Conversion to Mahomedanism and rights of inheritance.**—In the absence of a custom to the contrary [see secs. 16 and 17], succession to the estate of a convert to Mahomedanism is governed by the Mahomedan law (l).

According to the Mahomedan Law, a Hindu cannot succeed to the estate of a Mahomedan. Therefore if a Hindu, who has a Hindu wife and children, embraces Mahomedanism, and marries a Mahomedan wife and has children by her,

264. *Mst. Nanda v. The Crown* (1920) 1 Lab. 440, 59 I.O. 33.  
(h) (1871) 14 Moo.I.A. 309.  
(i) *John Jehan Chandra v. Abinash* (1939) 2 Cal. 12, 133 I.O. 75, ('39) A.O. 417.  
(j) (1936) 59 Bom. 278, 36 Bom.L.R. 1021, 154 I.O. 1076, ('36) A.B. 5 affirming 36 Bom.L.R. 11, 149 I.O. 1232, ('34) A.B. 93.  
(k) (1941) 45 O.W.N. 1047, 74 O.L.J. 212, ('41) A.O. 582.

(l) *Mst. Sen Singh v. Maqbul Hasan Khan* (1930) 57 I.A. 213, 35 C.W.N. 89, 128 I.O. 268, ('30) A.P.C. 251; *Ohedambaram v. Mo Nyein Me* (1923) 6 Rang. 243, 111 I.O. 2, ('28) A.R. 179, *Bhagwan Baksh v. Drigbijai* (1931) 6 Luck. 487, 132 I.O. 779, ('31) A.O. 801, *John Jehan Chandra v. Abinash* (1939) 2 Cal. 12, 133 I.O. 75, ('39) A.O. 417.

his property will pass on his death to his Mahomedan wife and children, and not to his Hindu wife or children (m).

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**16. Khojas and Cutchi Memons.**—In the absence of proof of special usage to the contrary, Khojas and Cutchi Memons in the Bombay Presidency are governed in matters of succession and inheritance, not by the Mahomedan, but by the Hindu law (n). But this customary law has been to a great extent abolished.

*Law after the Shariat Act, 1937.*—The effect of the Shariat Act is to abolish except as to agricultural land and other matters to which the Act does not apply the customary law of succession of Khojas and Cutchi Memons and to make them subject to the Mahomedan law.

*Law before the Shariat Act, 1937.*—Khojas and Cutchi Memons were originally Hindus. They became converts to Mahomedanism about 400 years ago, but retained their Hindu law of inheritance and succession as a customary law. Hence the Hindu law of inheritance and succession is applied to them on the ground of custom. The application of the rules of Hindu law by custom is limited to rules of inheritance and succession and does not extend to the rules relating to joint property (o). This custom is so well established among them that if any member of either of these communities sets up a usage of succession opposed to the Hindu law of succession, the burden lies upon him to prove such usage (p). Where, however, Cutchi Memons migrate from India and settle among Mahomedans, as in Mombassa, the presumption that they have adopted the Mahomedan custom of succession should be readily made (q). In matrimonial matters Cutchi Memons are governed by Mahomedan law and in such matters a Cutchi Memon girl is a free agent (r).

*Cutchi Memons Act.*—It was provided by sec. 2 of the Cutchi Memons Act XLVI of 1920 and the Cutchi Memons Amendment Act XXXIV of 1923, that any person who satisfies the prescribed authority—

(a) that he is a Cutchi Memon and is the person whom he represents himself to be;

(b) that he is competent to contract within the meaning of section 11 of the Indian Contract Act, 1872; and

(c) that he is resident in British India,

may by declaration in the prescribed form and filed before the prescribed authority declare that he desires to obtain the benefit of this Act, and thereafter the

(m) (1928) 6 Rang. 243, 111 I.O. 2, ('28) A.B. 173, *supra*.

(n) *Khojas and Memons Case* (1847)

Perry's O.O. 110; *Hirbai v. Gorbai*

(1875) 12 Bom. H.C. 294 [*Kho-*

*jas*]; *Abdul Gadar v. Turner* (1884)

9 Bom. 158 [*Cutchi Memons*]; *Mahomed Sidick v. Haji Ahmed* (1885)

10 Bom. 1 [*Cutchi Memons*]; *Moo-*

*na Haji Joonas v. Haji Abdul Ro-*

*ham* (1905) 30 Bom. 187; *Saboo*

*Sidick v. Aliy Mahomed* (1904) 30

Bom. 270; *Jan Mahomed v. Datu*

(1914) 38 Bom. 449, 22 I.O.

195; *Mangaldas v. Abdul* (1914) 16

Bom. L.R. 224, 23 I.O. 565; *Fida-*

*husein v. Monghtabai* (1936) 38

Bom. L.R. 397, 164 I.O. 538,

('36) A.B. 257.

(o) *Haji Osman v. Haroon Saleh Maho-*

*med* (1923) 47 Bom. 369, 68 I.O.

862, ('23) A.B. 148; *Jan Maho-*

*med v. Datu supra*; *Fidakhusein v.*

*Monghtabai supra*

(p) *Abdurahim v. Halimabai* (1915) 43

I.A. 35, 39, 18 Bom. L.R. 635,

639, 32 I.O. 413; *Hirbai v. Gor-*

*bai* (1875) 12 B.H.C. 294, 305;

*Rahimabai v. Hirbai* (1877) 3

Bom. 34; *In re Haji Ismail* (1890)

6 Bom. 452, *Ashabai v. Haji Tyeib*

(1882) 9 Bom. 116; *Mahomed*

*Sidick v. Haji Ahmed* (1885) 10

Bom. 1, *In the goods of Malbai*

(1866) 2 B.H.C. 275. The

Hindu law as to joint family pro-

perty does not apply to Cutchi Me-

mons, *Haji Osman v. Haroon*

(1923) 47 Bom. 369, 68 I.O. 862,

('23) A.B. 148

(q) (1915) 43 I.A. 35, 18 Bom. L.R.

635, 32 I.O. 413, *supra*.

(r) *Abdul Rasak v. Adam Usman* (1935)

37 Bom. L.R. 603, 159 I.O. 650,

('35) A.B. 367.

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16, 16A**

declarant and all his or children and their descendants will in matters of succession and inheritance be governed by the Mahomedan law. The Act, however, governed the portion to the estate of the declarant and did not affect the right of the declarant himself to succeed as a Cutchi Memon to the property of other Cutchi Memos who have signed no such declaration (s).

The Cutchi Memons Act of 1920 is now repealed by the Cutchi Memons Act X of 1938, which came into force on the 1st day of November, 1938. The Act is as follows:—

1. (1) This Act may be called the Cutchi Memons Act, 1938.

(2) It shall come into force on the 1st day of November, 1938.

2 Subject to the provisions of sec. 3, all Cutchi Memons shall, in matters of succession and inheritance, be governed by the Muhammadan law.

3. Nothing in this Act shall affect any right or liability acquired or incurred before its commencement, or any legal proceeding or remedy in respect of any such right or liability; and any such legal proceeding or remedy may be continued or enforced as if this Act had not been passed.

4 The Cutchi Memons Act, 1920, is hereby repealed.

In *Bayabai v. Bayabai* (t) it was held by a single judge of the Bombay High Court that the Act applies not only to wills made by a Cutchi Memon after the passing of the Act but also to those made before the Act was passed, provided the testator dies after the passing of the Act, and such wills have to be construed and looked at from the point of view of Mahomedan law. The law as to succession and inheritance in the case of Cutchi Memons, therefore, is as follows. Prior to 1920 a Cutchi Memon was governed by Hindu law in matters of succession and inheritance. Under Act XLVI of 1920 he had the option to declare himself to be governed by Mahomedan law and on his exercising the option, not only he but his minor children and their descendants would be governed by the Mahomedan law in this respect. Thereafter under the Shariat Act of 1937 he was governed by Mahomedan law in the matter of intestate succession, and as to testate succession he would be subject to that law if he made the necessary declaration under sec. 3 of the Act. Now under the Cutchi Memons Act, 1938, a Cutchi Memon is governed by Mahomedan law in all matters of succession and inheritance.

*Effect of repeal of the Cutchi Memons Act, 1920.*—It is submitted that it was not within the competence of the Indian Legislature to repeal this Act so far as it affects agricultural land in the Governors' provinces. The powers of the Central Legislature to repeal and alter laws are made precisely co extensive with their powers of direct legislation (u). In a recent decision (v) the Federal Court of India held that the Hindu Women's Right to Property Act, 1937, was beyond the competence of the Indian Legislature so far as its operation might affect agricultural land in the Governors' Provinces. It would thus seem that the repeal of the Act of 1920 so far as it operates to affect succession to agricultural land in the Governors' provinces was *ultra vires* the Indian Legislature. The result then is that successions still governed by the Cutchi Memons Act, 1920.

**16A. Testamentary power of Cutchi Memons.**—(1) A Mahomedan cannot by will dispose of more than one-third of his property without the consent of his heirs [sec. 104]. But a Cutchi Memon may dispose of the whole of his property

(s) *Abdulsakur v. Abubakkar* (1930) 54 Bom. 358, 362, 127 I. C. 401, (30) A.B. 191.  
(t) (1942) 44 Bom L R 792, (42) A. B. 328.  
(u) Section 292 of the Government of

India. Act. 1935 See *Dobis v. Temporalities Board* (1881) 7 App. Cas. 136.  
(v) In re Hindu Women's Right to Property Act (1941) F.C.R. 12, (41) A.F.C. 72.

by will; this is founded on custom (*w*). But the effect of the Shariat Act, 1937, is to give any Cutchi Memon resident in British India the option of abandoning this customary law (except in the case of agricultural land and other matters to which the Act does not apply) and adopting the Mahomedan law. See sec. 5A.

(2) A Cutchi Memon will is to be construed by the rules of Hindu law relating to wills (*x*). But this rule will not apply in cases governed by the Mahomedan law under the Shariat Act.

*Sub-Sec. (2).*—Thus if a Cutchi Memon will contains a contingent bequest, the bequest will be void if the will is to be construed by the Mahomedan law, but valid if it is to be construed by the Hindu law.

(3) A Cutchi Memon is governed by the Mahomedan law so far as it relates to the execution and revocation of his will (*y*). See sec. 102.

**16B. Testamentary power of Khojas.**—A Khoja also may dispose of the whole of his property by will (*z*). But the effect of the Shariat Act on this rule is the same as in the case of Cutchi Memons. See sec. 16A.

**16C. Halai Memons.**—Halai Memons domiciled in Bombay are governed in all respects by the Mahomedan law (*a*).

Halai Memons of Porbandar in Kathiawar follow in matters of succession and inheritance Hindu law and not Mahomedan law, differing in that respect from Halai Memons of Bombay. It was so held in the undermentioned case upon evidence of custom among Halai Memons in Porbandar (*b*).

**17. Sunni Bohras of Gujrat: Molesalam Girasias of Broach.**—The Sunni Bohra Mahomedans of Gujarat (*c*), and the Molesalam Girasias of Broach (*d*), are governed by the Hindu law in matters of succession and inheritance.

These communities also were originally Hindus, and became subsequently converts to Mahomedanism. The Sunni Bohras of Gujarat must not be confounded with the Bohras of Bombay who are Shias. See sec. 20 below. They are affected by the Shariat Act in the same way as Khojas and Cutchi Memons.

(w) *Advocate-General v. Jambabas* (1915) 41 Bom. 181, 31 I.O. 106; *Advocate-General v. Karmali* (1903) 29 Bom. 133, 148-149.

(v) *Abdulnur v. Abubekkar*, *supra*, dissenting from *dicta* to the contrary in *Advocate-General v. Jambabas*, *supra*.

(y) *Abdul Hameed v. Mahomed Yoonus* (1940) 1 M.L.J. 278, 187 I.C. 414, ('40) A.M. 158; *Sarabai Amabai v. Mahomed Caseem* (1919) 4 A.B. 80, (1919) 43 Bom. 641, *approved*.

(z) *Fatehaurin v. Monghibai* (1936) 38 Bom.L.R. 397, 164 I.C. 533, ('36) A.B. 257.

(a) *Khojas and Memons' Oath* (1847) Perry's O.C. 110, 115; *Khatubai v. Mahomed Hays Abu* (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.P.C. 414, affg *Mahomed Hays v. Khatubai* (1918) 43 Bom. 647, 51 I.C. 513.

(b) (1923) 50 I.A. 108, 47 Bom. 146, 72 I.C. 202, ('22) A.P.C. 414, *supra*.

(c) *Bai Baiji v. Bai Santok* (1894) 20 Bom. 53, *Nurba v. Abhram Mahomed* (1939) 41 Bom.L.R. 525, ('39) A.B. 449.

(d) *Fateenaji v. Harunangji* (1894) 20 Bom. 181.



## CHAPTER III.

### MAHOMEDAN SECTS AND SUB-SECTS.

**Ss. 18-20**      **18. Sunnis and Shias.**—The Mahomedans are divided into two sects, namely, the Sunnis and the Shias.

There is another class of Mahomedans called Motazilas. It is not clear whether they form an independent sect, or are an offshoot of the Shia sect.

The Cutchi Memons of Bombay and Ifalvi Memons belong to the Sunni sect. See secs. 16, 16A and 16C above.

**1v. Sunni sub-sects.**—The Sunnis are divided into four sub-sects, namely, the Hanafis, the Malikis, the Shafeis and the Hanbalis.

The Sunni Mahomedans of India belong principally to the Hanafi School.

*Presumption as to Sunnism.*—The great majority of the Mahomedans of this country being Sunnis, the presumption will be that the parties to a suit or proceeding are Sunnis, unless it is shown that the parties belong to the Shia sect (a). But the Shia law is not foreign law. It is part of the law of the land, and so no expert evidence can be led to prove it as in the case of foreign law (b).

As most Sunnis are Hanafis the presumption is that a Sunni is governed by Hanafi law (c).

**20 Shia sub-sects.**—The Shias are divided into three main sub-sects, namely, the Athna-Asharias, the Ismailiyas and the Zaidyas.

These three sub-sects are shown in the Table annexed to the Introduction.

There are two divisions of Athna-Asharias, namely, (1) Akhbari, and (2) Usuli.

As most Shias are Athna Asharias the presumption is that a Shia is governed by the Athna-Asharia exposition of the law (d).

The Khojas and the Bohras of Bombay belong to the Ismailiya sub-sect. See secs. 16, 16C and 17.

The Aga Khan is the spiritual head of the Khojas and he has the sole right of determining who shall or shall not remain a member of the community. All the offerings are his absolute property and are not subject to any trust for the benefit of the community (e).

(a) *Bafatun v Bafait Khanum* (1903) 30 Cal. 683, 686, *Mt. Iqbal Begum v. Mt. Syed Begum* (1938) 140 I.C. 829, ('58) A.L. 80; *Akbarally v. Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A. 356.  
(b) *Aziz Bano v Muhammad* (1925) 47

ALL. 823, 89 I.C. 690, ('25) A. A. 720.  
(c) *Akbarally v. Mahomedally* (1932) 34 Bom. L.R. 655, 138 I.C. 810, ('32) A.B. 356.  
(d) 34 Bom L.R. 655, *supra*.  
(e) *The Advocate-General ex relations Darya Muhammad v. Muhammad Hu-*

The Mullaji is the spiritual head of the Dawoodi Bohras of Bombay and in regard to properties vested in him and to offerings received by him for the benefit of the community it has been held in one case that he is a trustee (*f*). Ch. III,  
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**21. Each sect governed by its law.**—The Mahomedan law applicable to each sect or sub-sect is to prevail as to litigants of that sect or sub-sect (*g*).

The Sunni law will therefore apply to Sunnis, and the Shia law to Shias, and the law peculiar to each sub-sect will apply to persons belonging to that sub-sect.

**22. Change of sect.**—A Mahomedan male or female who has attained the age of puberty, may renounce the doctrines of the sect or sub-sect to which he or she belongs, and adopt the tenets of the other sect or any other sub-sect, and he or she will thenceforth be subject to the law of the new sect or sub-sect (*h*).

**23 Marriage between Shia male and Sunni female—wife's status not affected.**—A Sunni woman contracting marriage with a Shia does not thereby become subject to the Shia law (*i*).

The same proposition, it would appear, holds good in the case of the marriage of a Shia female with a Sunni male. See sec. 199A.

- sein* (1879) 12 Bom. H. C. 323; (*g*) *Deedar Hossain v. Zuhoor-oon-Nissa* (1841) 2 M. I. A. 441, 477.  
*Haji Bibi v. H. H. Sir Sultan*  
*Mahomed Shah, The Agha Khan* (*h*) *Haydt-un-Nissa v. Muhammad* (1890)  
(1909) 11 Bom. L. R. 409, 2 I. O. 12 All. 290, 17 I. A. 73 (change of  
874 sect); *Muhammad v. Gulam* (1864)  
(*f*) *Advocate-General of Bombay v. Fusu-* 1 B. H. O. 236 (change from Sha-  
*fully Ebrahim* (1922) 24 Bom. L. 1 B. H. O. 236 (change from Sha-  
R. 1080, 84 I. C. 769, (21) A. (*i*) *Nasrat v. Hamidan* (1882) 4 All. 205  
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## CHAPTER IV.

### SOURCES AND INTERPRETATION OF MAHOMEDAN LAW.

**Ss. 24-26**      **24. Sources of Mahomedan law.**—There are four sources of Mahomedan law, namely, (1) the Koran; (2) Hadis, that is, precepts, actions and sayings of the Prophet Mahomed, not written down during his lifetime, but preserved by tradition and handed down by authorized persons; (3) Ijmaa, that is, a concurrence of opinion of the companions of Mahomed and his disciples; and (4) Kiyas, being analogical deductions derived from a comparison of the first three sources when they did not apply to the particular case (a).

*Kiyas* is reasoning by analogy. Abu Hanifa, the founder of the Hanafi sect of Sunnis, frequently preferred it to traditions of single authority. The founders of the other Sunni sects, however, seldom resorted to it (b).

**25. Interpretation of the Koran.**—The Courts, in administering Mahomedan law, should not, as a rule, attempt to put their own construction on the Koran in opposition to the express ruling of Mahomedan commentators of great antiquity and high authority.

Thus where a passage of the Koran (Sura ii, vv. 241-242) was interpreted in a particular way both in the *Hedaya* (a work on the Sunni law) and in the *Imama* (a work on the Shia law), it was held by their Lordships of the Privy Council that it was not open to a Judge to construe it in a different manner (c).

**26. Precepts of the Prophet.**—Neither the ancient texts nor the precepts of the Prophet Mahomed should be taken literally so as to deduce from them *new* rules of law, especially when such proposed rules do not conduce to substantial justice.

The words of the section are taken from the judgment of their Lordships of the Privy Council in *Baqar Ali v. Anjuman* (d).

It is a rule of Mahomedan law that a gift in perpetuity is not valid unless it is a gift to charity. Is a gift by a Mahomedan to his own children and their descendants a gift to charity? No—was the answer given by a majority of the Full Bench of the Calcutta High Court in *Bikani Mta v. Shuk Lal* (e). Yes—was the answer given by Ameer Ali, J., in a dissenting judgment, relying on the following precept of the Prophet Mahomed: "A pious offering to one's family to provide against their getting into want is more pious than giving alms to the

(a) *Morley*, Digest of Indian Cases, Introd. cccxvii.

(b) *Id* p. cccxxvii.

(c) *Aga Mahomed Jaffer v. Koolsoom Beebee*

(1897) 25 Cal. 9, 18, 24 I. A. 196, 204.

(d) (1902) 25 All. 236, 254, 30 I. A. 94.

(e) (1893) 20 Cal. 116.

beggars. The most excellent form of *Sadaqah* (charity) is that which a man bestows upon his own family." Referring to the judgment of Ameer Ali, J., their Lordships of the Privy Council observed in a later case (*f*), that it was not safe in determining what was the rule of Mahomedan law on a particular subject to rely upon abstract precepts taken from the mouth of the Prophet without knowing the context in which those precepts were uttered. Their Lordships further observed that the rule of Mahomedan law on the subject was that which was laid down by the majority of the Full Bench, and that the new rule of law sought to be deduced from the precept of the Prophet by Ameer Ali, J., was not one that would conduce to justice. A wakf in favour of children and descendants is now declared to be legal by the Mussalman Wakf Validating Act VI of 1913, *provided* there is an ultimate gift to charity. See secs. 159-161 below.

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**27. Ancient texts.**—New rules of law are not to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions (*g*).

**28 General rules of interpretation of Hanafi law.**—The three great exponents of the Hanafi-Sunni law are Abu Hanifa, the founder of the Hanafi school, and his two disciples, Abu Yusuf and Imam Muhammad.

It is a general rule of interpretation of the Hanafi law that where there is a difference of opinion between Abu Hanifa and his two disciples, Abu Yusuf and Imam Muhammad, the opinion of the disciples prevails (*h*). Where there is a difference of opinion between Abu Hanifa and Imam Muhammad, that opinion is to be accepted which coincides with the opinion of Abu Yusuf (*i*). When the two disciples differ from their master and from each other, the authority of Abu Yusuf is generally preferred (*j*). But these rules are not inflexible; they are to be regarded as rules of preference adopted by ancient jurists for their own guidance, but the subsequent history of opinion and practice will generally be of greater importance (*k*).

(f) *Abul Fata v. Rasamaya* (1894) 22 Cal. 619, 631, 632, 22 I.A. 76, 86, on appeal from *Rasamaya v. Abul Fata* (1891) 18 Cal. 399.

(g) *Bagar Ali v. Anjuman* (1902) 25 All. 256, 254, 30 I.A. 94, 111; dissenting from *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 448.

(h) *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 448; *Abdul Kadir v. Salima* (1886) 8 All. 149, 166-167.

(i) (1866) 8 All. 149, p. 162, *supra*; *Kutti Umma v. Nedungadi Bank, Ltd.* (1938) Mad. 148, 173 I.C. 692, (37) A.M. 731.

(j) *Kulsum Biba v. Golam Hossain* (1905) 10 C.W.N. 449, 488; *Khajah Hos-*

*sein v. Shahzadee* (1869) 12 W.R. 344, 346, *affmd.* in *Shahzadee v. Khaja Hossain* (1869) 12 W.R. 498, *Kutti Umma v. Nedungadi Bank, Ltd.* (1938) Mad. 148, 173 I.C. 699, (37) A.M. 731. See also sec. 151 below. In *Muhammad v. The Legal Remembrancer* (1893) 15 All. 321, 323, it was held that the opinion of Imam Muhammad should be preferred to that of Abu Yusuf, the Court thinking (though erroneously) that it was so laid down by the Full Bench in *Bikani Miu v. Shuk Lal* (1893) 20 Cal. 116.

(k) *Anus Begum v. Muhammad Tajala* (1933) 55 All. 743, 148 I.C. 26, (33) A.A. 634.

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Where there is a conflict of opinion, and no specific rule to guide the Court, the Court ought to follow that opinion which is most in accordance with justice, equity and good conscience (*l*).

**28A. Rules of equity.**—The rules of equity and equitable considerations commonly recognized in Courts of Equity in England are not foreign to the Mussulman system, but are in fact often referred to and invoked in the adjudication of cases under that system (*m*).

) *Aziz Bano v. Muhammad* (1926) 47  
All 828, 837, 89 I.O. 690, ('26)  
A.A. 720 [difference in Shia  
authorities], *Ebrahim Ali Khan v.*  
*Bai Asit* (1933) 58 Bom 254, 149  
(C 225, ('34) A B 21 (differ-

ence in Sunni authorities).  
(*m*) *Hamira Bibi v. Zubaida Bibi* (1915)  
43 I.A. 294, 301-802, 58 All. 581,  
582, 38 I.O. 87. See *Hidayat*,  
Book XX, p. 334, "Of the Duties  
of the Kazeer"

## CHAPTER V.

### SUCCESSION AND ADMINISTRATION.

[Before the Indian Succession Act, 1925, the principal Acts in force in British India relating to the administration of the estates of deceased persons were the Indian Succession Act, 1865, and the Probate and Administration Act, 1881. The Indian Succession Act, 1865, applied to Europeans, Parsis, East Indians and to all Natives of India other than Hindus, Mahomedans and Buddhists. The Probate and Administration Act applied to Hindus, Mahomedans and Buddhists. Both these Acts have been repealed by the Indian Succession Act, 1925, and their provisions re-enacted in that Act.]

#### 29. Administration of the estate of a deceased Mahomedan.—

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The estate of a deceased Mahomedan is to be applied successively in payment of (1) his funeral expenses and death-bed charges; (2) expenses of obtaining probate, letters of administration, or succession certificate; (3) wages due for service rendered to the deceased within three months next preceding his death by any labourer, artisan or domestic servant; (4) other debts of the deceased according to their respective priorities (if any); and (5) legacies not exceeding one-third of what remains after all the above payments have been made. The residue is to be distributed among the heirs of the deceased according to the law of the sect to which he belonged at the time of his death (*a*), and the heir has a right of contribution against his co-heirs, if by the action of the judgment creditor under a decree under sec. 52 of the Civil Procedure Code against all the heirs, he was left with less than his proper share of the net estate of the deceased (*b*). Under Mahomedan law, the payment of the debts of the deceased takes precedence over the legacies (*c*).

The order set forth above is in accordance with the provisions of the Indian Succession Act, 1925, secs. 320-323 and sec. 325. Item No. (1) funeral and death-bed charges do not include monies spent on ceremonies for securing the peace of the soul of the deceased (*d*). As regards item No. (5), it is to be noted that a Mahomedan cannot by will dispose of more than one-third of what remains of his property after payment of his funeral expenses and debts, unless the heirs consent thereto [s. 104]. The residue available for distribution is the residue of the partible estate. If the inheritance include both partible and im-

(a) *Hayat-un-Nissa v. Muhammad* (1890) 12 All. 290, 17 I.A. 73.

(b) *Mahomed Kasim Ali Khan v. Sadiq Ali Khan* (1908) 65 I.A. 219, 15 Luck. 494, 174 I.C. 977, ('88) A.P.O. 169.

(c) *Abdul Aziz v. Dharamsey Jetha & Co* ('40) A.L. 348.

(d) *Sajjad Hussain v. Muhammad Sayid Hasan* (1934) 154 I.C. 484, ('84) A.A. 71.

**Ss. 29, 30** partible estate, and the debts of the deceased have been paid out of the partible estate, there is no right of contribution against the heir who has succeeded to the impartible estate (e).

If the deceased was a Sunni at the time of his death, his property would be distributed among his heirs according to the Sunni law, and if he was a Shia, it would be distributed according to the Shia law. In other words, succession to the estate of a deceased Mahomedan is governed by the law of the sect to which he belonged at the time of his death, and not by the law of the sect to which the persons claiming the estate as his heirs belong (f). A deceased Mahomedan is presumed to have been a Sunni and the onus is on the person alleging him to have been a Shia (g).

The person primarily entitled to administer the estate of a deceased Mahomedan, that is, to apply it in the manner set forth in the section, is the *executor* appointed under his will. If the deceased left no will, the person entitled to administer his estate would be the person to whom letters of administration are granted. Such a person is called *administrator*. The persons primarily entitled to letters of administration are the *heirs* of the deceased: Indian Succession Act, 1925, sec. 218. In the absence of an executor or administrator, the persons entitled to administer the estate are the *heirs* of the deceased.

**30. Vesting of estate in executor and administrator.**—The executor or administrator, as the case may be, of a deceased Mahomedan, is, under the provisions of the Indian Succession Act, 1925, sec. 211, his legal representative for all purposes, and all the property of the deceased vests in him as such. The estate vests in the executor, though no probate has been obtained by him (h).

But since a Mahomedan cannot dispose by will of more than one-third of what remains of his property after payment of his funeral expenses and debts, and since the remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realized the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one-third for the purposes of the will; and of these trusts, one is created by the Act and the probate irrespective of the will, the other by the will established by the probate (i).

The first paragraph is a reproduction of the provisions of sec. 211 of the Indian Succession Act, 1925. An executor under the Mahomedan law is called *wasi*, derived from *wasyyat* which means a will. But though the Mahomedan law recognized a *wasi*, it did not recognize an administrator, there being nothing

(e) *Nawab Mirza Mahomed Sadug Ali Khan v. Nawab Fakir Jahan Begum* (1934) 9 Luck. 701, 148 I C 1052, ('34) A.O. 307.  
(f) 12 All. 290, *supra*.  
(g) *Mt Iqbal Begum v Mt Syed Begum* (1933) 140 I C 829, ('33) A.L. 80.  
(h) *Venkata Subramma v Ramayya* (1932) 59 I A. 112, 85 Mad. 443, 136 I C 111, ('32) A PC 92 [a case of a Hindu will, which applies al-

so to a Mahomedan will]; *Shemad v Ahmed Omar* (1931) 33 Bom.L. R. 1056, 135 I C. 817, ('31) A. B. 533; *Mahomed Usuf v. Hargovandas* (1923) 47 Bom. 231, 70 I C. 268, ('22) A.B. 892; *Sakina Bibi v. Mahomed Isak* (1910) 37 Cal. 339, 8 I C 655, is no longer good law.  
(i) *Kurru'dain v. Nuzhat-ud-dowla* (1905) 33 Cal. 116, 128, 32 I A. 244, 257.

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analogous in that law to "letters of administration." A *wasi* or executor under the Mahomedan law was merely a *manager* of the estate, and no part of the estate of the deceased *vested* in him as such. As a *manager* all that he was entitled to do was to pay the debts and distribute the estate as directed by the will. He had no power to sell or mortgage the property of the deceased, not even for the payment of his debts. The first time this power was conferred upon him was by the Probate and Administration Act, 1881. Under sec. 4 of that Act, the estate of the property of a Mahomedan testator *vested* in his executor, and it is so now under sec. 211 of the Indian Succession Act, 1925. The property *vests* in the executor *even if no probate has been obtained*. As a result of the *vesting* of the estate in the executor, he has the power to dispose of the property *vested* in him in due course of administration, a power which he did not possess before the Probate and Administration Act, 1881; see sec. 90 of that Act, now sec. 307 of the Indian Succession Act, 1925. The will may provide for the *revocation* of the executor, but if the executor is an heir the provision is not valid unless the other heirs consent (*j*).

**31. Devolution of inheritance.**—Subject to the provisions of secs. 29 and 30, the whole estate of a deceased Mahomedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (s. 104), devolves on his heirs *at the moment of his death*, and the devolution is not suspended by reason merely of debts being due from the deceased (*k*). The heirs succeed to the estate as tenants-in-common in specific shares (*l*).

*Representation of deceased's estate.*—The theory of representation is not known to the Mahomedan law. Under its provisions the estate of a deceased person devolves upon his heirs *at the moment of his death*. The estate vests immediately in each heir in proportion to the share ordained by Mahomedan law. As the interest of each heir is separate and distinct one of a number of heirs cannot be treated as representing the others (*m*). But an heir in possession of assets of an estate can be sued by a creditor of the deceased upon principles discussed in secs. 33 and 36 *infra*. There is no intermediate vesting in any one, such as an executor or administrator, as under the Indian Succession Act (*n*).

*Limitation for suit by an heir for recovery of his share.*—As stated above, the heirs succeed to the estate as tenants-in-common in specific shares. When the heirs continue to hold the estate as tenants-in-common without dividing it, and one of them subsequently brings a suit for recovery of his share, the period of limitation for the suit does not run against him from the date of the death of the deceased, but from the date of express ouster or denial of title; in other words, it is art. 144 of Sch. I to the Limitation Act, 1908, that applies, and not art.

(j) *Mahomed Hussain v. Aishabai* (1934) 36 Bom L R 1155, 155 I.C. 334, ('35) A.B. 84 (a Sunni case).

(k) *Jafri Begum v. Amir Muhammad* (1885) 7 All. 822; *Muhammad Awaiz v. Har Sahai* (1885) 7 All. 716; *Baland Khan v. Mt. Begum Noor* ('43) A. Pesh. 62; *Fazulla Khan v. Abdul Jabbar* ('48) A. Pesh. 65.

(l) *Abdul Khader v. Ohidambaram* (1909) 32 Mad. 278, 278, 8 I.C. 876; *Abdul Mejeeth v. Eriahmachaariar* (1917) 40 Mad. 243, 254, 40 I.C. 210; *Khatun Bibi v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306; *Mt.*

*Fardousjehan Begum v. Kazi Shag-u-ddin* (1942) N.L.J. 261, ('42) A.N. 73; *Mohammad Sohail v. Ghulam Inayat* (1941) Lah. 308, ('41) A.L. 152 (F.B.); *Mahomedally Tyebally v. Nafabai* (1940) 67 I.A. 406, 191 I.C. 113, ('40) A.P.C. 215. See also cases cited in footnote (a) below.

(m) *Sakina Begum v. Shahar Banoo* (1935) 10 Luck. 443 at 458, 152 I.C. 42, ('35) A.O. 62, 67; *Manna Gir v. Amar Jati* (1936) 58 All. 594, 160 I.C. 1030, ('36) A.A. 94.

(n) *Amar Dulhin v. Banj Nath* (1894) 21 Cal. 311, 315.



**Ss. 31, 32** 123 (o). In the undermentioned case, the Privy Council has held that a suit for administration of the estate of a Mahomedan is governed as regards immovable property by art. 144 and as regards movables by art. 120 (p).

*Parties to the suit by an heir.*—In a suit by an heir for the recovery of his share the co-heirs are proper parties; but as the interests of the heirs are distinct, the omission to join a co-heir is not a good reason for dismissing the suit (q). In other words the co-heir is not a necessary party, i.e., a party in whose absence no decree can be passed.

*Administration suit.*—Any heir or creditor of the deceased may bring a suit for the administration of the estate; he is not bound to bring a suit for partition (r). In an ordinary partition suit, the Court may, in working out its preliminary decree, instead of making an actual division of all the property, give one heir a charge over the share of another for any difference in favour of the former and any such charge imposed will bind the alienee *pendente lite* from that heir (s).

**32. Alienation by an heir of his share before payment of debts.**—(1) Any heir may, even before distribution of the estate, transfer his *own* share [see s. 37], and pass a good title to a *bona fide* transferee for value, notwithstanding any debts that might be due from the deceased (t) [ills. (a) and (c)].

The transfer must be one for value, that is, for a consideration, *e.g.*, a sale or a mortgage, as distinguished from a gift. If partition has not been effected the heir can only sell his undivided share and cannot sell a particular plot (u).

(2) A sale of the share of an heir in execution of a decree passed against him at the suit of his creditor amounts to a "transfer" within the meaning of sub-sec. (1), and will pass a good title to the purchaser in execution [ill. (b)].

(3) If the share transferred by an heir is a share in *immovable property* forming part of the estate of the deceased, and the transfer is made *during the pendency of a suit* by the widow of the deceased for her dower, in which a decree is passed creating a *charge* on the estate for the dower debt, the transferee will take the share of the heir *subject to the*

- (o) *Ghulam Mohammad v. Ghulam Husam* (1932) 59 I.A. 74, 54 All. 98, 136 I.C. 454, ('32) A.P.O. 81; *Kallangowda v. Bibahaya* (1930) 44 Bom. 943, 58 I.C. 42; *Nurdin v. Bu Umrao* (1921) 45 Bom. 519, 59 I.C. 790, ('21) A.B. 56, *Bai Juv v. Bas Bibandoo* (1929) 31 Bom. L.R. 199, 118 I.C. 785, ('29) A.B. 141; *Musammal Jano v. Narasingh Das* (1930) 11 Lah. 29, 117 I.C. 803, ('29) A.L. 549, *Ma Bi v. Ma Khatoon* (1929) 7 Rang. 744, 121 I.C. 785, ('30) A.R. 72; *Eusam Khan v. Janki* (1929) 61 All. 101, 111 I.C. 809, ('28) A.A. 487.
- (p) *Mahomedally Tyeally v. Safabai* (1940) 67 I.A. 406, 191 I.C. 113, ('40) A.P.O. 215.

- (q) *Zehra-ki Begum v. Nasr-uddin Khan* (1945) 57 All. 445, 152 I.C. 1098, ('35) A.A. 110.
- (r) *Ensafully v. Abdeali* (1921) 45 Bom. 75, 59 I.C. 396, ('21) A.B. 424.
- (s) *Khatun Bibi v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 773, ('39) A.M. 306.
- (t) *Bazayef Hossain v. Doodi Chund* (1979) 5 I.A. 211, 4 Cal. 402; *Wahid-unnessa v. Shubratun* (1870) 6 Beng. L.R. 54; *Land Mortgage Bank v. Bidyadhar* (1880) 7 Cal. L.R. 480, *Khatun Bibi v. Abdul Wahab Sahib* (1939) M.W.N. 346, 184 I.C. 778, ('39) A.M. 306.
- (u) *Mansab Ali v. Mt. Nabir-unnessa* (1934) 150 I.C. 443, ('34) A.A. 702.

*charge* (v), but if the widow's decree is a simple money decree the transferee will not be affected (w) [ill. (d)1]. Where a charge is created in favour of an heir in an administration suit on the share of another heir and the latter transfers his share *pendente lite*, the transferee will take the share subject to the charge (x). See Transfer of Property Act, 1882, sec. 52, and /sec. 223 below.

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#### Illustrations.

[(a) A Mahomedan dies leaving several heirs. After his death the whole body of heirs sell the whole of his estate without paying his debts. After the sale, a creditor of the deceased obtains a decree against the heirs for his debt, and applies for execution of the decree by an attachment and sale of the property in the hands of the purchaser. He is not entitled to do so. The reason is that a creditor of a deceased Mahomedan cannot follow his estate into the hands of a *bona fide* purchaser for value: *Land Mortgage Bank v. Bidyadhar* (1880) 7 Cal.L.R. 460 (with facts somewhat altered).]

(b) A Mahomedan dies leaving two sisters as his only heirs. After his death, C, a creditor of the deceased, obtains a decree against the sisters for his debt. Subsequently a creditor of the sisters obtains a decree against them for his debt, and the property of the deceased come to their hands is sold in execution of the decree to P. In this case C is not entitled to attach the property in the hands of P in execution of his decree: *Wahidunnissa v. Shubratun* (1870) 6 Beng. L.R. 54 (with facts slightly altered).

*Note.*—In the case in ill. (a), the sale was by private treaty. In the case in ill. (b), it was in execution of a decree. Both these sales stand on the same footing. In both the cases the purchaser was a *bona fide* purchaser for value.

(c) A Mahomedan dies leaving a widow and a son. A large sum of money is due to the widow for her dower. [Dower is a debt, and the widow is to that extent a creditor of the estate of her deceased husband. She is not, however, a secured creditor (s. 223)]. The son mortgages his share in the estate to M, without paying the dower debt. After the mortgage, the widow obtains a decree against the son, who is in possession of the whole estate for the dower debt, and attaches the son's share in execution of the decree. The mortgagee then obtains a decree against the son on the mortgage for sale of the son's share mortgaged to him. (The share is sold in execution of the decree, and purchased by P. The mortgage having been made before the attachment, P is entitled to recover the son's share free from the attachment: *Bazayet Hosseini v. Dook Chund* (1878) 5 I. A. 211, 4 Cal. 402.

*Note.*—In the cases in ill. (a) and (b), the sale was by all the heirs of their shares. In the case in ill. (c), the sale is only by one of the heirs.

(d) A Mahomedan died leaving three widows and a son. He left considerable property both movable and immovable. After his death, the widows brought a suit against the son, who was in possession of the whole estate, for an administration of the estate of the deceased, and for payment of the dower debt out of the estate. A decree was passed in the suit directing the son to render an account of the properties of the deceased come to his hands, and providing for payment of the dower out of the properties. (This was not a simple money decree, but a decree creating a charge on the properties for the dower debt). The widows

(v) *Mahomed Wajid v. Bazayet Hosseini* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

(w) *Bhola Nath v. Maqbul-un-Nissa* (1903) 26 All. 28. *Abdul Rahman v.*

*Inayat Bibi* ('31) A.O. 63, 180 I.O. 113

(x) *Khatun Bibi v. Abdul Wahab Sakib* (1939) M.W.N. 846, 184 I. O. 778, ('39) A.M. 306

**Ss. 32-36** then applied for execution of the decree. *Pending execution*, (which is the same thing as *pending the suit*), the son mortgaged his share to M. M sued the son on the mortgage, and obtained a decree for sale of the share mortgaged to him. The share was sold in execution of the decree to P who purchased with notice of the decree. Upon these facts the Privy Council held that P took the share subject to the decree in favour of the widows: *Mahomed Wajid v. Bazayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 402.

*Note*.—If the mortgage had been effected *before* the suit, it would not have been affected by the decree: *Bazayet Hossein v. Dooli Chund* (1878) 5 I.A. 211, 4 Cal. 402.]

**33. Extent of liability of heirs for debts.**—Each heir is liable for the debts of the deceased to the extent only of a share of the debts proportionate to his share of the estate (*y*).

[A Mahomedan, who is indebted to C in the sum of Rs. 3,200, dies leaving a widow, a son and two daughters. The heirs divide the estate without paying the debt, the widow taking 1/8, the son taking 7/16, and each daughter 7/32 then sues the widow and the son for the whole of the debt due to him from the deceased. The widow is liable to pay only  $(1/8 \times 3,200) = \text{Rs. } 400$ , and the son  $(7/16 \times 3,200) = \text{Rs. } 1,400$ ; they are not liable for the whole debt: *Pirithi Pal Singh v. Hussain Jan* (1882) 4 All. 361.]

This section should be read subject to section 36 *infra*.

**34. Distribution of estate.**—Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

It was stated in two Allahabad cases (*z*), and also in a Calcutta case (*a*), relying on some passages in the *Hedaya*, that the estate could not be distributed if it was insolvent. In a later Allahabad case (*b*), however, Mahmood, J., observed that the translation of the said passage was only a loose paraphrase of the original Arabic, and expressed the opinion that the estate may be distributed even if it is insolvent.

**35. Suit by creditor against executor or administrator.**—If the estate is represented by an executor or administrator, a suit by a creditor of the deceased should be instituted against the executor or administrator, as the case may be.

**36. Suit by creditor against heirs.**—If there be no executor or administrator, the creditor may proceed against the heirs of the deceased, and where the estate of the deceased has not been distributed between the heirs, he is entitled to execute

(y) *Pirith Pal Singh v. Hussain Jan* (1882) 4 All. 361; *Ambachankar v. Sayad Ali* (1894) 19 Bom. 273; *Hussunterm v. Kamaluddin* (1885) 11 Cal. 421, 428; *Abbas Naskar v. Chairman, District Board, 24-Parganas* (1902) 59 Cal. 691, 141 I.C. 871, (188) A.O. 81; *Ramcharan v. Hanifa Khatun* (1902)

A.A. 501.  
(z) *Hamir Singh v. Zakia* (1875) 1 All. 57, 59 [F.B.]; *Pirithi Pal Singh v. Hussain Jan* (1882) 4 All. 361, 366.  
(a) *Hussunterm v. Kamaluddin* (1885) 11 Cal. 421, 428.  
(b) *Jairi Begam v. Amir Muhammad* (1885) 7 All. 822, 838.

the decree against the property as a whole without regard to the extent of the liability of the heirs *inter se* (c).

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There is, however, a conflict of opinion as to whether a decree obtained by a creditor against some of the heirs of the deceased is binding on the other heirs.

According to the decisions of the High Court of Calcutta, any creditor of the deceased may sue any one of the heirs who is in possession of the *whole or any part* of the estate, without joining the other heirs as defendants, to recover the *entire* debt, and the Court may in such a suit pass a decree for the sale, not only of the share of that particular heir in the estate, but of all the assets of the deceased that are in his possession. Where such a decree is passed, and a sale is effected in execution of the decree, the sale will pass to the purchaser not only the interest of that particular heir in the property, but the interests of the other heirs also (including minors) though they were not parties to the suit (d), unless the decree was obtained by fraud, or was taken by consent (e) [ills. (a) and (b)]. These decisions proceed on the view that a creditor's suit is an administration suit, and any heir in possession of the estate represents the estate for the purpose of the suit. In a later case, however, the same High Court held that the above decisions could only apply if the heir who was sued was in possession of the estate on behalf of the other heirs, but not if he held the estate on his own behalf (f).

The High Court of Bombay in some cases (g) took the same view as the Calcutta High Court did in its earlier decisions, though on different grounds, but with this difference that a decree against an heir in possession bound the other heirs only if he was in possession of the *whole* estate [ills. (c) and (d)]. But this view has been disapproved in recent cases, and it has been held that a sale in execution of a decree passed against an heir in possession in a creditor's suit does not pass to the purchaser the interest of those heirs in the estate who were not parties to the suit even if the heir against whom the decree was passed was in possession of the *whole*

(c) *Mamraj Mansram v. Muhamad Hashim* (1941) 194 I.C. 727, ('41) A.C. 245.

(d) *Muttyjan v. Ahmed Ali* (1882) 8 Cal. 370; *Amir Dulhin v. Bai Neth* (1894) 21 Cal. 311.

(e) *Aswamithen v. Roy Lutchmeput Singh* (1878) 4 Cal. 142, 155.

(f) *Abbas Nasar v. Chairman, District*

*Board, 24-Parganas* (1932) 59 Cal. 691, 141 I.C. 871, ('33) A.C. 81.

(g) *Khureshetibi v. Keso Vinayek* (1887) 12 Bom. 101; *Davalava v. Bhameji* (1895) 20 Bom. 338, followed in *Virehand v. Kendu* (1915) 39 Bom. 729, 31 I.C. 180 [mortgage-decree].

**S. 36** estate (h) [ill. (e)]. This coincides with the view taken by the High Court of Allahabad.

In *Pathummabi v. Vittil* (i), the High Court of Madras followed the earlier rulings of the Bombay High Court, but this decision is no longer law having been dissented from if not expressly overruled by a Full Bench in *Abdul Majeeth v. Krishnamachariar* (j), adopting the view taken by the Allahabad High Court.

According to the rulings of the Allahabad High Court, a decree relative to his debts passed in a contentious or non-contentious suit against such heirs only of a deceased Mahomedan debtor as are in possession of the whole or part of his estate, binds each defendant to the extent of his share in the estate (k), but it does not bind the other heirs who, by reason of absence or any other cause, are out of possession, so as to convey to the purchaser, in execution of such a decree, the interests of such heirs as were not parties to the decree. This is because under Mahomedan law each heir inherits a separate and defined share and as he has no interest in the share inherited by another heir he cannot be said to represent the estate that has devolved upon the other heirs (l). But if they sue for a declaration that the sale is not binding on them, and it is proved that the debts have been paid out of the proceeds of the sale, they ought to be put on terms as a matter of equity, and required to pay their proportionate share of the debt before they are granted the declaration sued for (m) [ills. (f) and (g)].

The High Court of Nagpur (n) and the Chief Court of Oudh (o) have taken the same view as that taken by the Allahabad High Court. The Lahore decisions are not consistent. One Judge of that High Court has agreed with the

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| <p>(h) <i>Bhagirthabai v. Koshanbi</i> (1919) 43 Bom. 412, 51 I.O. 18, dissenting from 12 Bom. 101 and 20 Bom. 338, <i>supra</i>, <i>Shahasaheb v. Sada-shiv</i> (1919) 48 Bom. 575, 581, 51 I.O. 223 [mortgage suit], dissenting from (1915) 39 Bom. 729, 31 I.O. 180, <i>supra</i>, <i>Lala Moya v. Manubai</i> (1923) 47 Bom. 712, 73 I.O. 246, ('23) A.B. 411; <i>Veerhadrapa Shilwant v. Shekabat</i> (1939) Bom. 232, 41 Bom.L.R. 249, 182 I.O. 539, ('39) A.B. 188.</p> <p>(i) (1902) 28 Mad 734, 738.</p> <p>(j) (1917) 40 Mad. 243, 255, 257, 40 I.O. 210.</p> <p>(k) <i>Dattu Mal v. Hari Das</i> (1901) 23 All. 263, 265.</p> | <p>(l) <i>Manni Gir v. Amar Jats</i> (1936) 58 All. 594, 150 I.O. 1030, ('36) A.A. 94.</p> <p>(m) <i>Jafri Begam v. Amir Muhammad Khan</i> (1885) 7 All. 822; <i>Muhammad Awas v. Har Sahai</i> (1885) 7 All. 716; <i>Hameer Singh v. Zakia</i> (1875) 1 All. 57. See also <i>Mahomed Alladad v. Muhammad Imaul</i> (1888) 10 All. 239.</p> <p>(n) <i>Suleman v. Abdul Shakoor</i> (1939) N.L.J. 577, 188 I.O. 292, ('40) N. 99.</p> <p>(o) <i>Amir Jahan v. Khadim Husain</i> ('31) A.O. 253, 182 I.O. 75. See also <i>Sakuna Begum v. Shahr Banoo Begum</i> (1935) 10 Luck. 443, 152 I.O. 42, ('35) A.O. 62, 67.</p> |
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Calcutta view (*p*), while another has followed the later Bombay decisions (*q*).

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Only the Judicial Committee can resolve these differences of opinion. It may here be noted that under the Indian Succession Act, 1925, there is no exclusion of Mahomedans from the operation of secs. 303 and 304 which embody the principle of "executor de son tort"; also that since 1908 the definition of "legal representative" in the Code of Civil Procedure includes "any person who intermeddles with the estate of the deceased" [sec. 2 (11)]. Part of the difficulty lies in the need to draw a line between the Mahomedan law of inheritance, succession, etc., and methods of procedure and administration as to which British Indian Courts have their own rules. [*cf.* per Mahmood, J., in *Jafri Begum v. Amir Muhammad Khan* (*r*)].

The decision in *Jafri Begum v. Amir Muhammad Khan* was referred to by the Privy Council in a recent judgment (*Mahomed Kasim Ali Khan v. Sadig Ali Khan* (*supra*) with apparent approval and it was pointed out that it proceeded upon the equitable principle of the right to contribution as between co-heirs in respect of the debts of the deceased. The observations of Mahmood, J., in that case, which too were cited by the Privy Council, seem to be pertinent. He said: "Upon the death of a Mahomedan owner, his property . . . immediately devolves upon his heirs in specific shares and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure and must be regulated according to the law which governs the action of the Court."

#### Illustrations.

[*(a)* A Mahomedan dies leaving a widow, a daughter, and two sisters. After his death a suit is brought by a creditor of the deceased against the widow and the daughter who alone are in possession of the whole estate, and a decree is passed "against the assets of" the deceased. The decree and the sale in execution of the property left by the deceased are binding on the sisters though they were not parties to the suit: *Muttyan v. Ahmed Jilly* (1882) 8 Cal. 370. See note to ill. (*b*) below.

[*(b)* A Mahomedan dies leaving a widow and other heirs. A suit is brought by a creditor of the deceased against the widow alone who is in possession of part of the estate. The other heirs are not necessary parties, and the creditor is entitled to a decree not only against the share of the widow in the estate, but the entire assets which have come into her hands and which have not been applied in the discharge of the liabilities to which the estate may be subject at her husband's death: *Amir Dulhin v. Baij Nath* (1894) 21 Cal. 311.

*Note.*—As to the cases cited in ills. (*a*) and (*b*), it was pointed out by the High Court of Calcutta that the defendants in those cases were in possession of the estate on behalf of all the heirs; otherwise the only decree that the creditor would be entitled to would be a decree for a proportionate share of the debt: *Abbas Naskar v. Chavman, District Board, 24-Parganas* (1932) 59 Cal. 691, 141 I.C. 871, ('33) A.C. 81.

[*(c)* A Mahomedan woman, Khatiza, dies leaving a minor son and a daughter. After her death a suit is brought by a creditor of the deceased "against Khatiza, deceased, represented by her minor son represented by his guardian" (*s*),

(*p*) *Mt. Amir Begum v. Dr. Ahmad Jalal Din* ('35) A.L. 273.

(*q*) *Balak Ram v. Inayat Begum* (1885) 180 I.C. 217, ('85) A.L. 940.

(*r*) *Jafri Begum v. Amir Muhammad Khan* (1888) 7 All. 822; *Muhammad Awan v. Har Sahai* (1885) 7 All. 718; *Hamir Singh v. Zakia* (1875) 1 All. 57. See also *Mu-*

*hammad Allahdad v. Muhammad Ismail* (1888) 10 All. 239.

(*s*) This form of suit, which was at one time common in the Mofussil of Bombay, has been disapproved of by the Bombay High Court. See *Rampurath v. Gaurahankar* (1923) 25 Bom.L.R. 7, 85 I.O. 464, ('24) A.B. 109.

s. 36, 37 and a decree is passed in that form. The deceased was entitled to a share in a *Khoti Fatah*, and "the right, title, and interest of Khatiza" in that share is sold in execution of the decree. The purchaser acquires a title unimpeachable by the daughter, though she was not a party to the suit or to the subsequent proceedings in execution: *Khurshetbi v. Keso Vinayek* (1887) 12 Bom. 101 (f). [No reference was made in the judgment to the Calcutta cases cited above nor to the Allahabad cases cited in ill. (f)].

(d) A Mahomedan dies leaving a widow, a minor son, and two daughters. After his death a suit is brought by a mortgagee from the deceased against the son as represented by his guardian and mother, claiming possession of the land mortgaged to him as owner under a *gahan lahan* clause in the mortgage. The widow is in possession of the estate, and a decree *ex parte* is passed directing her to deliver possession of the land to the mortgagee, and he is accordingly put in possession. The decree binds the daughters though they were not parties to the suit, and they are not entitled to redeem the mortgage as against the mortgagee or a purchaser from him: *Davalava v. Bhimaji* (1895) 20 Bom. 238.

(e) A Mahomedan dies leaving a widow and a daughter. After his death C, a creditor of the deceased, sues the widow for the recovery of a debt due to him and a decree is passed in his favour for Rs. 327 to be recovered out of the estate of the deceased. In execution of the decree, the right, title and interest of the deceased in a house is sold and it is purchased by P. The daughter, who was not a party to the suit, subsequently sues P to recover by partition her share in the house. *Held*, disapproving the cases cited in illa. (c) and (d), that the daughter, *not being a party to C's suit*, was not bound by the decree passed in the suit, and that the sale did not pass her interest in the house to P, and that she was entitled to recover her share in the house: *Bhagirthibai v. Roshanbi* (1919) 43 Bom. 412, 51 I.C. 18. [In this case the widow against whom the decree was obtained was in possession of the whole house; see p. 427 of the report, lines 27-28].

(f) A creditor of a deceased Mahomedan obtains a decree upon a hypothecation bond "for recovery of his debt by enforcement of lien" against one of the heirs of the deceased in possession of the estate. The whole estate is sold in execution of the decree, and it is purchased by the decree-holder. Subsequently another heir of the deceased, who was not a party to these proceedings, sues the decree-holder as purchaser for recovery of his share in the estate. According to the Allahabad High Court, he is entitled to possession of his share on payment of his proportionate share of the debts, if the sale proceeds were applied in payment of the debt: *Muhammad Awais v. Har Sahai* (1885) 7 All. 716, following *Jafri Begam v. Amir Muhammad* (1885) 7 All. 822.

(g) A creditor of a deceased Mahomedan obtains a money decree against an heir of the deceased in possession of the estate, and attaches certain immovable property forming part of the estate in execution of the decree. The value of the immovable property exceeds the share of the defendant. According to the Allahabad High Court, the defendant is entitled to object to the attachment and sale of the right and interest of the other heirs who were not parties to the suit, upon the ground that as regards them he is in possession of the property as trustee: *Dallu Mal v. Hari Das* (1901) 23 All. 263].

**37. Alienation by one of several heirs for payment of debts**—One of several heirs of a deceased Mahomedan, though he may be in possession of the whole estate of the deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging the debts of the

deceased. If he sells or mortgages any property in his possession forming part of the estate of the deceased, though it may be for payment of the debts of the deceased, such sale or mortgage operates as a transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased (u). The transferor, of course, is, in his turn, entitled to obtain contribution from his co-heirs.

It has been so held by a Full Bench of the Madras High Court overruling *Pachumabi v. Vittal* (v), an earlier decision of the same High Court, and dissenting from the Allahabad decision in *Hasan Ali v. Mehdi Husain* (w). The Madras Full Bench decision has been followed by the Bombay High Court (x). In the undermentioned case, a single Judge of the Lahore High Court has held that if an heir who is in possession of the property seeks a declaration that the alienation effected in respect of that property without joining him in the transaction is illegal, he cannot be called upon to pay a proportionate share of the debts of the deceased as a condition precedent to the suit being decreed (y).

As to ostensible ownership, see *Mubarak-un-Nissa v. Muhammad* (z), a case under sec. 41 of the Transfer of Property Act, 1882.

### 38 Recovery through Court of debts due to the deceased.—

No Court shall pass a decree against a debtor of a deceased Mahomedan for payment of his debt to a person claiming on succession to be entitled to the effects of the deceased or to any part thereof, or proceed upon an application of a person claiming to be so entitled, to execute against such a debtor a decree or order for the payment of his debt, except on the production, by the person so claiming, of a probate or letters of administration evidencing the grant to him of administration to the estate of the deceased, or a certificate granted under sec. 31 or sec. 32 of the Administrator-General's Act, 1913, and having the debt mentioned therein, or a succession certificate granted under Part X of the Indian Succession Act, 1925, and having the debt specified therein, or a certificate granted under the Succession Certificate Act, 1889, or a certificate granted under Bombay Regulation VIII of 1827, and, if granted after the first day of May, 1889, having the debt specified therein.

(u) *Abdul Majesth v. Krishnamacharar* (1917) 40 Mad. 243, 40 I.C. 210 [F.B.]; *Sukur v. Aamot* (1923) 50 Cal. 378, 79 I.C. 491, ('24) A.C. 384; *Phul Chand v. Manta* (1938) All. 167, 174 I.C. 651, ('38) A.A. 182; *Mt. Zubida Bibi v. Mt. Zenab Bibi* (1942) 199 I.C. 604, ('42) A.L. 65. See *Gulam Goss v. Shriram* (1919) 43 Bom. 487, 51 I.C. 79 [sale of equity of redemption by one of the heirs—suit for redemption

by other heirs—limitation]

(v) (1902) 26 Mad. 734

(w) (1877) 1 All. 533

(x) *Alsaheb v. Seshe Gowund* (1931) 33 Bom. L.R. 1238, 135 I.C. 489, ('31) A.B. 545

(y) *Mt. Zubida Bibi v. Mt. Zenab Bibi* (1942) 199 I.C. 604, ('42) A.L. 65.

(z) (1924) 46 All. 377, 79 I.C. 174, ('24) A.A. 384.



**38, 39** *Explanation.*—The word “debt” in this section includes any debt except rent, revenue or profits payable in respect of land used for agricultural purposes.

This section reproduces the provisions of sec. 214 of the Indian Succession Act, 1925.

*Probate and Letters of Administration.*—It is not necessary in the case of a Mahomedan will that the executor should obtain probate of the will to establish his right as such in a Court of Justice [Indian Succession Act, 1925, sec. 21 (2)] (a). Nor is it necessary where a Mahomedan has died intestate that his heirs should obtain letters of administration to establish their right to any part of the property of the deceased in a Court of Justice [Indian Succession Act, 1925, sec. 212 (2)]. But where a suit is brought to recover a debt due to the deceased, the Court shall not pass a decree except on production of probate or of letters of administration or a certificate as mentioned in this section.

*Recovery of debts through Court.*—It must be observed that the rule laid down in the present section applies only where a debt due to the deceased is sought to be recovered through a Court. A debtor of a deceased person may pay his debt to the executor, though he may not have obtained probate, or, where he has died intestate, to his heirs even if they have not taken out letters of administration or a certificate, and such payment will operate as a discharge to the debtor. But payment of a debt by a debtor to one of several heirs does not discharge the debt as to all (b).

It may also be noted that where a debt is sought to be recovered by legal proceedings, it is not necessary that the plaintiff should have obtained either probate or letters of administration or a certificate before the date of the institution of the suit. It is enough if he produces the grant before the passing of the decree (c).

*Debt.*—A suit by one member of a family to recover his share of the family property from the other members is not a suit to recover a “debt” (d). A suit asking for a personal decree against the mortgagor in respect of a mortgage is a suit for a “debt.” But there is a conflict of opinion as to whether a suit for sale of the mortgaged property is a suit for a “debt.” The High Court of Allahabad has held that it is (e). The High Courts of Calcutta (f), Bombay (g), and Madras (h), have held that it is not.

**39. Enactment relating to administration.**—In matters not hereinbefore specifically mentioned, the administration of the estate of a deceased Mahomedan is governed by the provisions of the following Acts to the extent to which they are applicable to the case of Mahomedans, namely:—

- (1) the Indian Succession Act, 1925;
- (2) the Administrator-General's Act, 1913; and
- (3) Bombay Regulation VIII of 1827.

- (a) *Venkata Subamma v. Ramayya* (1932) 59 I.A. 112, 55 Mad 443, 136 I.C. 111, ('82) A.P.O. 92; *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255.  
 (b) *Pathummabi v. Vittā* (1902) 26 Mad. 734, 739. Cf. *Sitaram v. Shridhar* (1903) 27 Bom. 292. See also *Ahmed Bibi v. Abdul Kader* (1901) 25 Mad. 26, 39.  
 (c) *Chandra Kishore v. Prasanna Kumari* (1910) 38 Cal. 327, 38 I.A. 7, 9 I.C. 122; *Veerbhadrappa v. Shekappa*

- (1889) Bom. 282, 41 Bom.L.R. 249, 182 I.C. 539, ('39) A.B. 186.  
 (d) *Shaik Moosa v. Shaik Essa* (1884) 8 Bom. 241, 255.  
 (e) *Fateh Chand v. Muhammad* (1894) 16 All. 259.  
 (f) *Mahomed Yusuf v. Abdur Rahim* (1900) 26 Cal. 859.  
 (g) *Nanchand v. Yennawa* (1904) 23 Bom. 680.  
 (h) *Palaniyandi v. Veerammal* (1905) 29 Mad. 77.

Such of the provisions of the Administrator-General's Act as apply to Mahomedans come into operation when a Mahomedan dies having assets within the local limits of the ordinary original civil jurisdiction of the High Court of Calcutta, Madras or Bombay. In such a case, the Court may, upon the application of any person interested in the assets, direct the Administrator-General to apply for letters of administration of the effects of the deceased, if the applicant satisfies the Court that such grant is necessary for the protection of the assets (see sec. 10 of the Act, and also sec. 11).

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## CHAPTER VI.

### INHERITANCE—GENERAL RULES.

Ss. 40-42

**40. Heritable property.**—There is no distinction in the Mahomedan law of inheritance between movable and immovable property or between ancestral and self-acquired property.

There is no such thing as a joint Mahomedan family nor does the law recognize a tenancy in common in a Mahomedan family (*a*). In a Mahomedan family there is a presumption that the cash and household furniture belong to the husband (*b*).

**41. Birth-right not recognized.**—The right of an heir-apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor (*c*).

[*A*, who has a son *B*, makes a gift of his property to *C*. *B*, alleging that the gift was procured by undue influence, sues *C* in *A*'s lifetime on the strength of his right to succeed to *A*'s property on *A*'s death. The suit must be dismissed, for *B* has no cause of action against *C*. *B* has no cause of action, for he is not entitled to any interest in *A*'s property during *A*'s lifetime: *Hasan Ali v. Nazo* (1889) 11 All. 456, 458. But the gift would be liable to be set aside if the suit was brought after *A*'s death, provided it was brought within the period of limitation: *Kurritulain v. Nuzhat-ud-dowla* (1905) 33 Cal. 116, 32 I.A. 244.]

Such a right as that claimed by *B* in the above illustration is a mere *spes successionis*, that is, an expectation or hope of succeeding to *A*'s property if *B* survived *A* (*d*). The Mahomedan law "does not recognize any . . . interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir in the person entitled to it according to the rule of succession, he possesses no right at all" (*e*).

**42. Principle of representation.**—According to the Sunni law, the expectant right of an heir-apparent cannot pass by succession to his heir, nor can it pass by bequest to a legatee under his will (*f*). According to the Shia law, it does pass by succession in the cases specified in sec. 80 below.

[*A*, a Sunni Mahomedan, has two sons, *B* and *C*. *B* dies in the lifetime of *A*, leaving a son *D*. *A* then dies leaving *C*, his son, and *D*, his grandson. The whole of *A*'s property will pass to *C* to the entire exclusion of *D*. It is not open

(a) See *Abdul Rashid v. Sirajuddin* (1933)

145 I. O. 461, ('33) A. A. 208, 209.

(b) *Ma Ehatun v. Ma Bibi* ('83) A.R. 393, 149 I. O. 654.

(c) *Abdul Wahid v. Nuran Bibi* (1885) 11

Cal. 597, 12 I. A. 91; *Humseda v*

*Budhun* (1872) 17 W.R. 525, *Hasan*

*Ali v. Nazo* (1889) 11 All. 456;

*Abdool v. Goolam* (1905) 30 Bom. 304.

(d) *Abdool v. Goolam* (1905) 30 Bom. 304.

(e) *Hasan Ali v. Nazo* (1889) 11 All. 456,

458.

(f) *Abdul Wahid v. Nuran Bibi* (1885) 11

Cal. 597, 607, 12 I.A. 91. Mac-

naghten, p. 1, s. 9.

to *D* to contend that he is entitled to *B*'s share as representing *B*: *Moola Cassim v. Moola Abdul* (1905) 33 Cal. 173, 32 I.A. 177.]

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Ss. 42-44

In the case cited above their Lordships of the Privy Council observed: "It is a well-known principle of Mahomedan law that if any of the children of a man die before the opening of the succession to his estate, leaving children behind, these grand-children are entirely excluded from the inheritance by their uncles and their aunts." The son of a predeceased son is therefore not an heir (*q*).

If in the above case, *B* bequeathed any portion of his expectant share in *A*'s property to *X*, the latter would take nothing under the will. "A mere possibility such as the expectant right of an heir-apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest or transfer so long as the right has not actually come into existence by the death of the present owner" (*h*).

**43. Transfer of spes successionis: Renunciation of chance of succession.**—The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release (*i*).

*Illustrations.*

[*A* has a son *B* and a daughter *C*. *A* pays Rs. 1,000 to *C*, and obtains from her a writing whereby in consideration of Rs. 1,000 received by her from *A*, she renounces her right to inherit *A*'s property. *A* then dies, and *C* sues *B* for her share (one-third) of the property left by *A*. *B* sets up in defence the release passed by *C* to her father. The release is no defence to the suit, and *C* is entitled to her share of the inheritance, as the transfer by her was a transfer merely of a *spes successionis*, and, as such, inoperative. But *C* is bound to bring into account the amount received by her from her father: *Sumsuddin v. Abdul Husna* (1906) 31 Bom. 165; *Banoo Begum v. Mir Abed Ali* (1908) 32 Bom. 172, 174-175.]

The rule of Mahomedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of Property Act, 1882, sec. 6 (*a*). That section provides that "the chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred."

A Mahomedan heir may by his conduct be estopped from claiming the inheritance he has agreed to relinquish if the release was part of a compromise or family settlement and if he has benefited by the transaction (*j*).

A husband gives immovable property to his wife in lieu of her dower, and agrees not to claim any share of it as her heir on her death. Is the agreement valid and binding on the husband? The High Court of Allahabad has held that it is binding on the husband (*k*).

**44. Life-estate and vested remainder.**—(1) *Sunni law.*—The Judicial Committee in *Humeeda v. Budhun* (1872) 17 W.R. 525 observed that "the creation of (such) a life estate does not seem to be consistent with Mahomedan usage and there ought to be very clear proof of so unusual a trans-

(a) *Abdul Bari v. Nasir Ahmed* ('33) A.O. 142, 150 I.C. 330.

(b) *Abdul Wahid v. Nuran Bibi* (1885) 11 Cal. 597, 12 I.A. 91.

(c) *Ehanum Jon v. Jan Beebee* (1827) 4 Beng. S.D.A. 210; *Sumsuddin v. Abdul Husain* (1906) 31 Bom. 165; *Aza Bevi v. Karuppan* (1918) 41 Mad. 365, 46 I.C. 85, dissenting

from *Kunki v. Kunki* (1896) 19 Mad. 176. See also *Hurmool-Nusa Begum v. Allahdia Khan* (1871) 17 W.R. 108 [P.C.].

(d) *Lafajat Husain v. Hidayet Husain* (1938) All L.J. 342, 161 I.C. 851, ('38) A.A. 573

(k) *Nasir-ul-Haq v. Fayaz-ul-Rahman* (1911) 38 All. 457, 9 I.C. 530.

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action"; and in *Abdul Gafur v. Nizamuddin* (1892) 49 I. A. 170 referred to "life-rents" as "a kind of estate which does not appear to be known to Mahomedan law". The difficulty arises out of the Mahomedan law of gift and does not appear to extend beyond cases of pure *hiba* whether *inter vivos* or by will. As explained in Chapter XI (*cf. s. 138* below), if a gift be made subject to a condition which derogates from the grant, the condition is void, *e.g.*, a partial restraint on alienation: but a condition which does not affect the corpus of the thing given is not within the rule, *e.g.*, when there is a reservation of income to the donor or a gift of usufruct to another donee. In the *Hedaya* (489) the principle is applied to *amrees* (gifts for life). The Prophet approved of *amrees* but held the condition annexed to them by the grantor to be void . . . "the meaning of *amree* is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. . . . An *amree* moreover is nothing but a gift and a condition; and the condition is invalid; but a gift is not rendered null by involving an invalid condition." Accordingly it was held in certain cases that a gift for life operates as an absolute gift (*l*).

The assumption underlying this doctrine however is that what is given is the corporal thing itself; and as the refusal to permit gifts of life interests produces serious inconvenience and gives rise to some unprofitable distinctions, the assumption has not gone without challenge. Can it not be held that what is given is not (*e.g.*) the land but an interest therein; and that this is given unconditionally there being no intention to make a gift of the corpus?

In *Amjad Khan v. Ashraf Khan* (*m*) this question was raised in an acute form. The deed described the transaction as a gift without consideration. It recited that the donee and the heirs of the donor had consented. By it the donor gave to his wife his entire property as to one-third with power to alienate and "as to the rest she shall not possess any power of alienation but she shall remain in possession thereof for her lifetime. After the death of the donee the entire property gifted away by this document shall revert to the donor's collaterals." On the question whether the interest

(*l*) *Nizamuddin v. Abdul Gafur* (1899) 13 Bom. 264; *Abdoola v. Mahomed* (1905) 7 Bom. L.R. 306.  
(*m*) (1929) 56 I.A. 218, 4 Luck. 305, 116

I.O. 405, ('29) A.P.C. 149, affirming (1925) 87 I.O. 446, ('25) A.O. 568.

given in the one-third was an absolute interest or was only a life interest plus a power to alienate, the Judicial Committee took the latter view. Their Lordships decided the case by asking, as a matter of construction of the deed, what was the subject-matter of the gift? Was it merely a life interest in the property together with a power of alienation over one-third thereof? Or was it an absolute interest in the property coupled with an inconsistent condition? Holding on the construction of the deed that the subject-matter of the gift was a life interest only (together with the power of alienation as to one-third) they dismissed the appeal of the donee's heir: the gift of a life-estate was not given the effect of an absolute estate. On the argument that a life-estate could not be created by gift *inter vivos* their Lordships expressed no opinion, holding that, if right, it would only mean that the donee took nothing by the gift—a result which would carry no benefit to her heir.

It is not possible to read this decision as proceeding upon the ground that the case was not one of *hiba* pure and simple. It is direct authority against regarding a life interest as enlarged by the doctrine which invalidates a condition restrictive of a gift and the decisions to that effect abovenoted (n) must be treated as overruled by it. Subsequent decisions have so interpreted the Board's judgment (o).

Both as regards life-estates and remainders there is considerable uncertainty as to the consequences of this decision. It does not decide that in Sunni law a life interest can be validly created by way of gift, but the doubt hitherto cast upon the matter has had reference to the validity of the limit in cases of gift. The validity of the grant has very old authority: the Hedaya discloses the tradition that the Prophet approved of *amrees* just as he disapproved of *rikba* (e.g., if I die before you then this house is yours). A life interest is not illegal: admittedly a Mahomedan can create such an interest by contract.

If such an interest, when created by gift is to be treated as void, instead of being treated as absolute, the change will be more marked than the improvement. The Bombay and

(n) *Nizamudin v. Abdul Gufur* (1888) 13 Bom. 204; *Abdoola v. Mahomed* (1905) 7 Bom.L.R. 306.  
(o) *Abdul Khaleque v. Begim Behara* ('36) A.C. 485; *Bai Saroobai v. Hussein Sonji* (1936) 38 Bom.L.R. 903,

165 I.C. 34, ('36) A.B. 330; *Mt. Subhanbi v. Mt. Umraobi* (1938) 161 I.C. 719, ('36) A.N. 113, dissenting from *Abdul v. Abdul* (1929) 131 I.C. 35, ('29) A.N. 313.

## S. 44

Nagpur High Courts have held that a gift of a life interest is valid (p). The Chief Court of Oudh has held that the bequest of a life interest by will is valid (q).

It remains to consider whether under Sunni law a gift of a life-estate to A with remainder to B is a good gift to B and whether it amounts to a vested remainder so as to take effect even if B dies before A. By English law in such a case B takes a vested interest and can dispose of his interest by transfer *inter vivos* or by will. On his death intestate his interest will pass to his heirs even if he predeceases A. In *Abdul Wahid Khan v. Mt. Nuran Bibi* (1885) 12 I.A. 91, 11 Cal. 597 [illustration (a)] the Judicial Committee held that such an interest as a vested remainder did not seem to be recognized by Mahomedan law, and this case has been accepted as an authority for the proposition that the remainderman cannot take unless he survives the tenant for life (r). The case of *Umeh Chunder Sircar v. Mt. Zahoor Fatma* (1890) 17 I.A. 201, 11 Cal. 164 [illustration (b)] cannot be regarded as invalidating this conclusion since the point was not taken and the principles of Mahomedan law do not appear to have been discussed. The facts of the case sufficiently account for the omission, but they do not enable the case to be distinguished from *Abdul Wahid Khan v. Nuran Bibi* in point of law: neither was a case of *hiba* pure and simple.

In *Abdul Wahid Khan's* case the principle applied was as follows: "The arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris' or 'making some stranger an heir' and cannot be regarded as creating a present or vested interest" (12 I.A. at p. 101).

(2) *Family settlement*.—A life-estate may be created by an agreement in the nature of a family settlement, whether such agreement is preceded by litigation or not, but "the creation of such a life-estate does not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction" [*Humeeda v. Budhun* (1872) 17 W.R. 525]. Such an agreement is from its very nature a

(p) *Bai Sarobas v. Hussein Samji* (1936) 38 Bom L.R. 903, 165 I.C. 34, ('36) A.B. 330, *Mt. Subhanbi v. Mt. Umraobi* (1936) 161 I.O. 719, ('36) A.N. 115.

(q) *Nazruddin v. Khairat Ali* (1938) 172 I.O. 284, ('38) A.O. 51.

(r) *Abdul Karim Khan v. Abdul Qayum*

*Khan* (1906) 28 All. 342, *Harpal Singh v. Lekraj Kunwar* (1908) 30 All. 406, 420; *Abdool Hussein v. Goolam Hussein* (1905) 30 Bom. 304, 317, *Rasoolbhai v. Yusuf Ajam* (1935) 57 Bom. 737, 148 I.C. 82, ('35) A.B. 324.

transaction for a consideration, and it must be distinguished from a pure *hiba* or gift mentioned in sub-sec. (1) above. [*Umjad Alli Khan v. Mohumdee Begum* (1867) 11 M.I.A. 517 at 548; *Khawajeh Solehman v. Nawab Sir Salimullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.C. 138, ('22) A.P.C. 107; *Jagdish Narai v. Bande Ali Mian* (1939) 20 P.L.T. 328, 183 I.C. 467, ('39) A.P. 406.]

(3) *Hiba-bil-uwaz*.—The rule stated in sub-sec. (1) above does not apply to a *hiba-bil-uwaz*. As to *hiba-bil-uwaz*, see sec. 141 below.

(4) *Shia law*.—The Shia law allows the creation of a life-estate and a vested remainder, as held by Jenkins, C.J., and Heaton, J., in *Banoo Begum's* case [illustration (f)]. In two other cases however Beaman, J., expressed the opinion that the Arabic texts there relied upon did not support the conclusion reached, and observed that an estate for life and a vested remainder were unknown to the Shia law as much as to the Sunni law (s).

(5) *Wakf*.—Both under the Sunni and the Shia law life-estates may be created by *wakf*: see sec. 160.

#### Illustrations.

(a) One of two persons claiming to be the sons of Mouzzam Khan, a Sunni, sued Gauhar Bibi, his widow, who was in possession of the suit lands in Oudh under a *Kabulyat* and in pursuance of a summary settlement made by Government in 1858. The plaintiff claimed that Mouzzam Khan had made the estate over to him and his brother. The suit was compromised in terms contained in two petitions to the Court, namely, that the widow should during her life-time continue as before to possess and be mistress of the *Talooka*, but should not alienate so as to deprive the plaintiff of his right and that after her death the plaintiff and his brother should possess and enjoy it, "should become successors to and proprietors of the said talooka." The widow survived both. Held that neither of them acquired any such right as would under Mahomedan law form the subject of inheritance. "Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in *Abdul Rahman* and *Abdul Subhan* which passed to their heirs on their death in the life-time of *Gauhar Bibi*". Also: "To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law": *Abdul Wahid Khan v. Mt. Nuran Bibi* (1885) 12 I.A. 91, 102, 100, 11 Cal. 597.

(b) By a deed of settlement in 1871 a Sunni leased lands to his second wife Amani Begum at a fixed rent of one rupee on condition that if she had a child by him the grant should be taken as a perpetual *mokurruri*: if no such child was born then it was only to be a life *mokurruri* and after her death the property was to go to the two sons of the settlor, Farzund and Farhut. Appellant and

(s) *Jainabai v. Sethna* (1910) 34 Bom 604, 612-3, 6 I.C. 513; *Cassamally*

*v. Currimbhoy* (1911) 36 Bom. 214, 258-4, 12 I.C. 225.



**S. 44** respondent both claimed to have taken title to one-half of the property as purchasers of Farzund's right, title and interest at execution sales. Appellant's sale was in 1879 and respondent's in 1881. At the time of appellant's attachment the settlor, his wife and sons were all alive but before the sale in 1879 the settlor had died. At all material times the widow and Farzund were alive. (Both were respondents to the Privy Council appeal: the latter died pending the hearing thereof in 1887). It could not have been contended at the trial in 1883 or in the High Court in 1885, and it was not contended in the Privy Council that the gift to Farzund had failed. Both auction purchasers had the same title save that (a) the appellant was first in time, (b) his attachment had been in the settlor's life time. Respondent's argument concentrated on (b): during the settlor's life the birth of a child to him was a contingency: this contingency no longer remained in 1881. This is the only argument dealt with in the judgment on this part of the case: it was held on the construction of the deed of 1871 that the wife's estate was enlarged and the sons' interest defeated on the birth of a child: not that the sons' interest failed to arise until either husband or wife had died. As presented to the Judicial Committee by the rival auction purchasers the case raised no point of Mahomedan law. The contention advanced in *Rasoolbibi v. Usuf Ajam* (1933) 57 Bom. 737 at 766, 148 I.C. 82, ('33) A.B. 324 for the appellant with reference to this case cannot be accepted. There were two elements of contingency (a) the birth of a child, and (b) the widow surviving Farzund. The former was relied on by the respondent: neither sought to profit by the latter: *Umes Chunder Sircar v. Zahoor Fatima* (1890) 17 I.A. 201.

(c) A Sunni lady, Bai Aishabai, by her will left two properties to her daughter, Hafizabibi, for life without power of alienation and after her death to Ajam (testatrix's step-son) and his descendants as absolute owners. Aishabai died in 1897. Hafizabibi enjoyed the properties till her death in 1926. Ajam died in 1919. The plaintiff was a daughter of Ajam suing for administration of his estate. *Held*, that in the events which had happened Ajam took no interest under the will. *Held further* by Mirza, J., and Beaumont, C.J., (Rangnekar, J., dissenting) that Hafizabai did not take an absolute estate: *Rasoolbibi v. Usuf Ajam* (1933) 57 Bom. 737, 148 I.C. 82, ('33) A.B. 324.

(d) Ono Nasiruddin, a Sunni, died having by his will left three villages to his wife, Mariambi, and declared that after the death of Mariambi, Abdul Kadar should become the owner thereof. Abdul Kadar died in 1899 and Mariambi in 1904. The plaintiff was a daughter of Abdul Kadar and the defendants were her mother and sister. If an absolute interest was created in favour of Mariambi the plaintiff's suit failed: if on her death the property went to Abdul Kadar's heirs the plaintiff was entitled to a seven annas share thereof subject to a question whether Abdul Kadar had validly made a gift to his wife in lieu of dower. *Held* on reference to a Bench, that Mariambi took a life estate only. Thereafter the appeal was disposed of on the footing that Abdul Kadar's heirs took the reversionary interest. *See quare?* *Mt. Subhanbi v. Mt. Umrabi* (1936) 161 I.C. 719, ('36) A.N. 113.

(e) By a deed of settlement the plaintiff's mother conveyed two properties to a trustee upon trust to pay taxes and repairs and out of the net rents and profits to pay to the settlor during her life such moneys as she should require and the balance as therein directed: on the settlor's death the net rents of one property were to be paid to the plaintiff: on the death of the survivor of the settlor and the plaintiff the property was to be held in trust for the plaintiff's son or sons and in default of sons for her daughters, with a gift over in the event of the plaintiff dying without issue. *Held* that assuming that the gift to the plaintiff was of a life interest in the property it did not by Sunni law confer an absolute estate upon her: *Bai Sareebai v. Hussein Somji* (1936) 38 Bom.L.B. 903, 165 I.C. 34, ('36) A.B. 330.

(f) It was provided by a consent decree in a suit to which the parties were Shia Mahomedans that a certain house should be held and enjoyed by A for her life, and that after her death it should be sold and the sale proceeds divided among her step-sons. It was held that A took a life interest in the house, and the step-sons took a definite interest like what is called in English law a vested remainder: *Banoo Begum v. Mir Abed Ali* (1908) 32 P. 172; *Siraj Hussin v. Mushaf Hussin* (1921) 21 O.C. 321, 49 I.C. 58. The question whether a vested remainder is recognized by the Shia law was raised in *Muhammad Raza v. Abbas Bandi Bibi* (1932) 59 I.A. 236, 7 Luck. 257, 137 I.C. 321, ('32) A.P.C. 158, but it was not decided as the document to be construed in that case was a compromise of a suit, and therefore one for a consideration.]

Ch. VI.  
Ss. 44-46

**45. Vested inheritance.**—A “vested inheritance” is the share which vests in an heir at the moment of the ancestor’s death. If the heir dies before distribution, the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death (t). See sec. 31 above.

[A dies leaving a son B, and daughter C. B dies before the estate of A is distributed leaving a son D. In this case, on the death of A, two-thirds of the inheritance vests in B, and one-third vests in C. On distribution of A’s estate, after B’s death the two-thirds which vested in B must be allotted to his son D.]

See Macnaghten, “Principles and Precedents,” p. 27, sec. 96; Rumsey’s Mahomedan Law of Inheritance, ch. ix; Rumsey’s *Al Sirajyyah*, 43-44.

**46. Joint family and joint family business.**—(1) When the members of a Mahomedan family live in commensality, they do not form a joint family in the sense in which that expression is used in the Hindu law (u). Further, in the Mahomedan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family (v). But if during the continuance of the family, properties are acquired in the name of the managing member of the family, and it is proved that they are possessed by all the members jointly, the presumption is that they are the properties of the family, and not the separate properties of the member in whose name they stand (w).

(2) If after the death of a Mahomedan his adult sons continue their father’s business, and retain his assets in the

(t) *Mst. Javai v. Hussam Baksh* (1922) 3 Lah. 80, 67 I. O. 154, ('22) A.L. 298.

(u) *Hakim Khan v. Gool Khan* (1882) 8 Cal. 826; *Suddurtonnessa v. Majada Khatoon* (1878) 3 Cal. 694, *Abdool Adood v. Mahomed Maknu* (1884) 10 Cal. 562; *Abdul Khader v. Chidambaram* (1908) 82 Mad. 276; *Abdul Samad v. Bibijan* (1926) 49 Mad. L.J. 675, 91 I. C. 618, ('25) A.M. 1149; *Abdul Rashid v. Sirajuddin* (1933) 145 I.C. 461, ('33) A.A. 206.

(v) *Abdul Kadar v. Bapubhai* (1898) 23 Bom. 188; *Mahamad Amin v. Hasan* (1906) 31 Bom. 143; *Mohideen Bee v. Syed Meer* (1915) 38 Mad. 1099, 1101, 82 I.O. 1002. See also *Isop Ahmed v. Abhramji* (1917) 41 Bom. 538, 612-613, 41 I.C. 761.

(w) *Aminuddin v. Tajuddin* (1932) 59 Cal. 541, 138 I.C. 761, ('32) A.O. 538.

**Ss. 46, 47** business, they will be deemed to stand in a fiduciary relation to the other heirs of the deceased, and liable to account as such for the profit made by them in the business (x). If after the death of the sons the business is continued by their sons or by other heirs, they also will be liable to account on the same footing (y).

(3) Members of a Mahomedan family carrying on business jointly do not constitute a joint family firm in the sense in which that expression is used in the Hindu law so as to attract the legal incidents of such a firm (z). Sons assisting a father in business are presumably his agents and are not his partners unless an agreement of partnership is proved (a). A minor may be entitled to a benefit in the business, but this will not make him liable on a mortgage executed by him along with his adult brothers in the course of the business carried on by the latter. The managers of such a business in a Mahomedan family have no right to impose any liability on the minor members of the family (b).

**47. Homicide.**—(1) Under the Sunni law, a person who has caused the death of another, whether intentionally, or by mistake, negligence, or accident, is debarred from succeeding to the estate of that other.

(2) Homicide under the Shia law is not a bar to succession unless the death was caused intentionally.

Rumsoy's *Al Sirajiyah*, 14; Baillie, II, 266, 369.

*Impediments to inheritance.*—The *Sirajiyah* sets out four grounds of exclusion from inheritance, namely, (1) homicide, (2) slavery, (3) difference of religion, and (4) difference of allegiance. Homicide, as an impediment to succession, is dealt with in the present section. The second impediment was removed by the enactment of Act V of 1843 abolishing slavery (c), and the third by the provisions of Act XXI of 1850 which abolished so much of any law or usage as affected any right of inheritance of any person by reason of his renouncing his religion. The bar of difference of allegiance disappeared with the subversion of the Mahomedan supremacy.

A person incapable of inheriting by reason of any of the above disqualifications is considered as not existing, and the estate is divided accordingly. According to the *Sirajiyah* he does not exclude others from inheritance (*Sir.* 22-28). Thus if A dies leaving a son B, a grandson C by B, and a brother D, and if B has caused the death of A, B is totally excluded from inheritance, but

(x) *Soudagar v. Soudagar* (1931) 54 Mad 543, 135 I.C. 357, ('81) A.M. 553  
(y) *Shukrulla v. Mt. Zuhra* (1932) 54 All. 916, 143 I.C. 230, ('82) A.A. 512  
(z) See *Solema Bibi v. Hafez Mahammad* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.C. 886.  
(a) *Tarachand v. Mokideen* (1935) 37 Bom. L.R. 654, 158 I.C. 701, ('85) A.

B. 401.  
(b) *Ahmed Ibrahim Saheb v. Meyyappa Chethar* (1939) M.W.N. 976, (1940) Mad. 285, ('40) A.M. 285.  
[*Abdul Rahim v. Abdul Hakim* ('31) A.M. 553; (1931) 54 Mad. 543, Explained.]  
(c) *Ujmadin Khan v. Zia-ul-Nissa* (1879) 8 I.A. 137, 3 Bom. 422.

he does not exclude his son *C*. The inheritance will devolve as if *B* were dead, so that *C*, the grandson, will succeed to the whole estate, *D* being a remote heir. In the undermentioned case, a single Judge of the Lahore High Court, has expressed the view that the rule of public policy would exclude a murderer and his descendants from succession (*d*).

**47A. Exclusion of daughters from inheritance by custom or by statute.**—Where daughters are excluded from inheritance either by custom (*e*) or by statute (*f*), they should be treated as non-existent, and the shares of the other heirs should be calculated as they would be in default of daughters.

*Watan Act*, 1886 (*Bombay*).—If a Mahomedan watandar dies leaving a widow, a daughter, and a paternal uncle, the daughter is not entitled under the Act to any interest in the watan lands, she being postponed in the order of succession. The lands are divisible between the widow and the paternal uncle as if the daughter were non-existent so that the widow will take  $\frac{1}{4}$ , and the uncle the residue,  $\frac{3}{4}$ . The widow will take only a life-interest in her share. If the daughter were not excluded, she would have taken  $\frac{1}{2}$ , the widow  $\frac{1}{8}$ , and the uncle the residue,  $\frac{3}{8}$ . The rule of Mahomedan law stated in the note to ill. (*e*) to sec. 50 does not apply to such a case.

**47B. Taluqdars of Oudh.**—A special rule of succession by primogeniture is enacted for the taluqdars of Oudh by the Oudh Estates Act I of 1869 and the Oudh Estates Amendment Act III of 1910. Succession is to the nearest male agnate according to the rule of lineal primogeniture. A daughter's son is not a male agnate and is therefore not entitled to succeed (*g*). As the Oudh Estates Act has laid down specific rules for devolution of taluqdari property and has in this respect displaced the Mahomedan law, such property should not be taken into consideration in determining the bequeathable one-third share of the entire assets of a Mahomedan testator (*h*).

(*d*) *Khan Gul Khan v. Karam Nisban* ('40) A.L. 172.

(*e*) *Muhammad Kamul v. Imtiaz Fatima* (1908) 80 I.A. 210, 81 All. 557, 4 I.O. 457.

(*f*) *Aminabi v. Abasaheb* (1931) 55 Bom. 401, 132 I.O. 892, ('31) A.B. 266.

(*g*) *Abdul Latif Khan v. Mt. Abadi Begum* (1984) 61 I.A. 322, 9 Luck. 421, 150 I.O. 810, ('84) A.P.C. 188.

(*h*) *Mohammad Zia-Ullah v. Kasim Mohammad* (1989) O.W.N. 581, 182 I.O. 190, ('89) A.O. 213.

## CHAPTER VII.

### HANAFI LAW OF INHERITANCE.

**Works of authority:** *Al Sirajyyah* and *Al Sharifiyyah*.—The principal works of authority on the Hanafi Law of inheritance are the *Sirajyyah*, composed by Shaikh Sirajuddin, and the *Sharifiyyah*, which is a commentary on the *Sirajyyah* written by Sayyad Shariff. The *Sirajyyah* is referred to in this and subsequent chapters by the abbreviation *Sir*, and the references are to the pages of Mr. Rumsey's edition of the translation of that work by Sir William Jones, as that edition is easily procurable. See also Sale's Translation of the Koran, Sura IV.

#### *A.—Three Classes of Heirs.*

**S. 48**     **48. Classes of heirs.**—There are three classes of heirs, namely, (1) Sharers, (2) Residuaries, and (3) Distant Kindred:

- (1) "Sharers" are those who are entitled to a prescribed share of the inheritance;
- (2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;
- (3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries (a).

*Sir*, 12-13. The first step in the distribution of the estate of a deceased Mahomedan, after payment of his funeral expenses, debts, and legacies, is to allot their respective shares to *such of the relations as belong to the class of sharers and are entitled to a share*. The next step is to divide the residue (if any) among *such of the residuaries as are entitled to the residue*. If there are no sharers, the residuaries will succeed to the whole inheritance. If there be neither sharers nor residuaries, the inheritance will be divided among *such of the distant kindred as are entitled to succeed thereto*. The distant kindred are not entitled to succeed so long as there is any heir belonging to the class of sharers or residuaries. But there is one case in which the distant kindred will inherit with a sharer, and that is where the sharer is the wife or husband of the deceased. Thus if a Mahomedan dies leaving a wife and distant kindred, the wife as sharer will take her share which is  $\frac{1}{4}$  and the remaining three-fourths will go to the distant kindred. And if a Mahomedan female dies leaving a husband and distant kindred, the husband as sharer will take his share  $\frac{1}{2}$ , and the other half will go to the distant kindred. To take a simple case: A dies leaving a mother, a son and a daughter's son. The mother as sharer will take her share  $\frac{1}{6}$ , and the son as residuary will take the residue  $\frac{5}{6}$ . The daughter's son, being one of the class of distant kindred, is not entitled to any share of the inheritance.

The question as to which of the relations belonging to the class of sharers, residuaries, or distant kindred, are entitled to succeed to the inheritance depends,

(a) *Abdul Serang v. Putes Bibi* (1902) 29 Cal. 738.

on the circumstances of each case. Thus if the surviving relations be a father and a father's father, the father alone will succeed to the whole inheritance to the entire exclusion of the grandfather, though both of them belong to the class of sharers. And if the surviving relations be a son and a son's son, the son alone will inherit the estate, and the son's son will not be entitled to any share of the inheritance, though both belong to the class of residuaries. Similarly, if the surviving relations belong to the class of distant kindred, *e.g.*, a daughter's son and a daughter's son's son, the former will succeed to the whole inheritance, it being one of the rules of succession that the nearer relation excludes the more remote.

Ch. VII,  
Ss. 48-50

#### 49. Definitions:—

(a) "True grandfather" means a male ancestor between whom and the deceased no female intervenes.

Thus the father's father, father's father's father and his father how high soever are all true grandfathers.

(b) "False grandfather" means a male ancestor between whom and the deceased a female intervenes.

Thus the mother's father, mother's mother's father, mother's father's father, father's mother's father, are all false grandfathers.

(c) "True grandmother" means a female ancestor between whom and the deceased no false grandfather intervenes.

Thus the father's mother, mother's mother, father's mother's mother, father's father's mother, mother's mother's mother, are all true grandmothers.

(d) "False grandmother" means a female ancestor between whom and the deceased a false grandfather intervenes.

Thus the mother's father's mother is a false grandmother. False grandfathers and false grandmothers belong to the class of distant kindred.

(e) "Son's son how low soever" includes son's son, son's son's son, and the son of a son how low soever.

(f) "Son's daughter how low soever" includes son's daughter, son's son's daughter and the daughter of a son how low soever.

#### B.—Sharers.

50. Sharers.—After payment of funeral expenses, debts, and legacies, the first step in the distribution of the estate, of a deceased Mahomedan is to ascertain which of the surviving relations belong to the class of sharers, and which again of these are entitled to a share of the inheritance, and, after this is done, to proceed to assign their respective shares to such of the sharers as are, under the circumstances of the case,

8. 50 entitled to succeed to a share. The first column in the accompanying table (p. 52A) contains a list of Sharers; the second column specifies the normal share of each sharer; the third column specifies the conditions which determine the right of each sharer to a share, and the fourth column sets out the shares as varied by special circumstances.

#### Illustrations.

*Note.*—The italics in the following and other illustrations in this chapter indicate the surviving relations. It will be observed that the sum total of the sharers in all the following illustrations equals unity:—

#### Father, Husband and Wife.

(a) <i>Father</i> .. ..	1/6	(as sharer, because there are daughters)
<i>Father's father</i> .. ..		(excluded by father)
<i>Mother</i> .. ..	1/6	(because there are daughters)
<i>Mother's mother</i> .. ..		(excluded by mother)
<i>Two daughters</i> .. ..	2/3	
<i>Son's daughter</i> .. ..		(excluded by daughters)
(b) <i>Husband</i> .. ..	1/2	
<i>Father</i> .. ..	1/2	(as residuary)
(c) <i>Four widows</i> .. ..	1/4	(each taking 1/16)
<i>Father</i> .. ..	3/4	(as residuary)

#### Mother.

(d) <i>Mother</i> .. ..	1/3	
<i>Father</i> .. ..	2/3	(as residuary)
(e) <i>Mother</i> .. ..	1/6	(because there are two sisters)
<i>Two sisters</i> .. ..		(excluded by father)
<i>Father</i> .. ..	5/6	(as residuary)

*Note.*—It is important to note that though the sisters do not inherit at all, they affect the share of the mother and prevent her from taking 1/3. This proceeds upon the principle that a person, though excluded from inheritance, may exclude others wholly or partially (*Str.* 28). In the present case the exclusion is partial, that is, the share of the mother is reduced, she taking 1/6 instead of 1/3, which latter share she would have taken if the deceased had not left sisters. In ill. (g) also, the exclusion of the mother is partial. Ill. (q) is a case of total exclusion.

It is stated in the *Sirajiyah* (p. 28) that "A person excluded may, as all the learned agree, exclude others, as, if there be two brothers or sisters or more, on whichever side they are, they do not inherit with the father of the deceased, yet they drive the mother from a third to a sixth." This instance is split into ills. (e) and (g). Ill. (q) is another instance of the same rule. It is taken from Baillie's Digest, Part I, p. 706. The above rule does not apply where a particular heir is excluded by custom or statute. Thus if the daughter is excluded by the Watan Act the wife's share is not reduced from 1/4 to 1/8 (d). See sec. 47A above.

(f) <i>Mother</i> .. ..	1/3	
<i>Sister</i> .. ..		(excluded by father)
<i>Father</i> .. ..	2/3	(as residuary)

(d) *Aminabai v. Abbasah* (1931) 55 Bom. 401, 131 I.C. 892, ('31) A.B. 266.

(g) <i>Mother</i> .. .. .	1/6	(because there is a brother and also a sister)	Ch. VII, §. 50
<i>Brother</i> (f., c., or u.) .. ..	(excluded by father)		
<i>Sister</i> (f., c., or u.) .. ..	(excluded by father)		
<i>Father</i> .. .. .	5/6	(as residuary)	

*Note.*—The mother takes 1/6, and not 1/3, where there are two or more brothers or two or more sisters, or *one brother and one sister*, or two or more brothers and sisters. The brother and the sister, though they are excluded from inheritance by the father, prevent the mother from taking the larger share 1/3. See note to ill. (e).

(h) <i>Husband</i> .. .. .	1/2	
<i>Mother</i> .. .. .	1/6	(=1/3 of 1/2)
<i>Father</i> .. .. .	1/3	(as residuary)

*Note.*—But for the *husband and father*, the mother in this case would have taken 1/3, as there are neither children nor brothers nor sisters. As the deceased has left a husband *and* father, the mother is entitled only to one-third of what remains after the husband's share is allotted to him. The husband's share is 1/2, and what remains is 1/2, and 1/3 of 1/2 is 1/6. The reason of the rule is clear, for if the mother took 1/3, the residuo for the father would only be  $1 - (1/2 + 1/3) = 1/6$ , that is, half the share of the mother, while as a general rule, the share of a male is twice as much as that of a female of parallel grade (*Sir. 22*). For the case where the deceased leaves a *widow and father*, see ill. (j) below.

(i) <i>Husband</i> .. .. .	1/2	
<i>Mother</i> .. .. .	1/3	
<i>Father's father</i> .. .. .	1/6	(as residuary).

*Note.*—The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the husband's share.

(j) <i>Widow</i> .. .. .	1/4	
<i>Mother</i> .. .. .	1/4	(=1/3 of 3/4)
<i>Father</i> .. .. .	1/2	(as residuary)

*Note.*—In this case, the mother would have taken 1/3 but for the *widow and father*, for there are neither children nor brothers nor sisters. As the widow *and* father are among the surviving heirs, the mother is entitled to one-third of the remainder after deducting the widow's share. The widow's share is 1/4, the remainder is 3/4, and the mother's share is 1/3 of 3/4, that is, 1/4. See ill. (h) above and the note thereto.

(k) <i>Widow</i> .. .. .	1/4	
<i>Mother</i> .. .. .	1/3	
<i>Father's father</i> .. .. .	5/12	(as residuary)

*Note.*—The mother takes 1/3, for the *father's father* does not reduce her share from one-third of the whole to one-third of the remainder after deducting the widow's share.

#### True grandfather and true grandmother.

(l) <i>Father's mother</i> .. .. .	(being a true <i>pat.</i> grandmother, is excluded by father)	
<i>Mother's mother</i> ...	1/6	(being a true <i>mat.</i> grandmother, is not excluded by father)
<i>Father</i> .. .. .	5/6	(as residuary)



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(m) <i>Father's mother</i>	..	} 1/6 (each taking 1/12)	.
<i>Mother's mother</i>	..		
<i>Father's father</i>	..	5/6 (as residuary)	

*Note.*—The father's mother is not excluded by the father's father, for the latter is not an *intermediate*, but an *equal*, true grandfather.

(n) <i>Father's father's mother</i>	..	(excluded by father's father)
<i>Father's father</i>	..	takes the whole as residuary

*Note.*—The father's father's mother is excluded by the father's father, for he is an intermediate true grandfather, the father's father's mother being related to the deceased *through* him.

(o) <i>Father's mother's mother</i>	1/6
<i>Father's father</i>	.. 5/6 (as residuary)

*Note.*—The father's mother's mother (who is a true pat. grandmother) is not excluded by the father's father (who is a true grandfather), for though he is nearer in degree, he is *not* in relation to her an *intermediate* true grandfather, as the father's mother's mother is *not related to the deceased through him*, but through the father.

(p) <i>Father's mother</i>	..	1/6
<i>Mother's mother's mother</i>	..	(excluded by father's mother who is a nearer true grandmother)
<i>Father's father</i>	..	5/6 (as residuary)
(q) <i>Father's mother</i>	..	(excluded by father)
<i>Mother's mother's mother</i>	..	(excluded by father's mother who is a nearer true grandmother)
<i>Father</i>	..	takes the whole as residuary

*Note.*—This illustration is taken from Baillie, 706. The father's mother, though she is excluded by the father, excludes the mother's mother's mother. This proceeds upon the rule that one who is excluded may himself exclude others wholly or partially. See note to ill. (o): in that case the exclusion of the mother by the sister was partial, for she *did* take a share, namely, 1/6. In the present case, however, the exclusion of the mother's mother's mother is entire. It need hardly be stated that if the deceased had not left the father's mother, the mother's mother's mother would have taken 1/6, for being a true *maternal* grandmother, she is not excluded by the father.

#### Daughters and Sons' daughters h.l.s.

(r) <i>Father</i>	..	..	1/6 (as sharer)
<i>Mother</i>	..	..	1/6
3 son's daughters, of whom one is by one son and the other two by another son	..	2/3 (each taking 2/9)	

*Note.*—The son's daughters take *per capita* and not *per stirpes*. The two-thirds is not therefore divided into two parts, one for the son's daughter by one son, and the other for the other two by another son, but it is divided into as many parts as there are son's daughters irrespective of the number of sons through whom they are related to the deceased. The reason is that the Sunni Mahomedan law does not recognize any right of representation (see s. 42), and the son's daughters do not inherit as representing their respective fathers, but in their own right as grand-daughters of the deceased. The same principle applies to the case of son's sons, brothers' sons, uncles' sons, etc. See Table of Residuaries.

(s) <i>Father</i>	..	..	1/6 (as sharer)
<i>Mother</i>	..	..	1/6

Daughter .. ..	1/2
4 son's daughters ..	1/6 (each taking 1/24)

*Note.*—There being only one daughter, the son's daughters are not entirely excluded from inheritance, but they take 1/6, which, together with the daughter's 1/2, makes up 2/3, the full portion of daughters.

(t) Father .. ..	1/6 (as sharer)
Mother .. ..	1/6
2 sons' daughters ..	2/3
Son's son's daughter ..	(excluded by sons' daughters)
(u) Father .. ..	1/6 (as sharer)
Mother .. ..	1/6
Son's daughter ..	1/2
Son's son's daughter ..	1/6

*Note.*—The rule of succession as between daughters and son's daughters applies, in the absence of daughters, as between higher son's daughters and lower son's daughters (*Sir.* 18). There being only one son's daughter in the present illustration, the son's son's daughter is not entirely excluded from inheritance, but she inherits 1/6, which together with the son's daughter's 1/2, makes up 2/3, the full share of son's daughters in the absence of daughters.

#### Sisters.

(v) Mother .. ..	1/6
2 full sisters .. ..	2/3 (each taking 1/3)
C. sister .. ..	(excluded by full sisters)
U. sister (or u. brother).	1/6
(w) 2 full sisters (or c. sisters) .. ..	2/3 (each taking 1/3)
2 u. sisters (or u. brothers)	1/3 (each taking 1/6)
(x) Full sister .. ..	1/2
2 c. sisters .. ..	1/6 (each taking 1/12)
U. brother .. ..	1/3 (each taking 1/6)
U. sister .. ..	

*Note.*—There being only one full sister, the consanguine sisters are not excluded from inheritance, but they inherit 1/6 which, together with the sister's 1/2, makes up 2/3, the collective share of full sisters in the inheritance (*Sir.* 21).

*Sir.* 14-23. The principal points involved in the Table of Sharers are explained in their proper places in the notes appended to the illustrations. The illustrations must be carefully studied, as it is very difficult to understand the rules of succession without them. The principles underlying the rules of succession are set out in the notes on sec. 52 below. It will be observed that the illustrations are so framed that the sum total of the shares does not exceed unity. For cases in which the total of the shares exceeds unity, see the next section.

The sharers are twelve in number. Of these there are six that inherit under certain circumstances as residuaries, namely, the father, the true grandfather, the daughter, the son's daughter, the full sister, and the consanguine sister. See the list of Residuaries given in sec. 52 below, and the notes on that section.

51. Increase (*Aul*).—If it be found on assigning their respective shares to the Sharers that the total of the shares exceeds unity, the share of each Sharer is proportionately diminished by reducing the fractional shares to a common denominator, and *increasing* the denominator so as to make it equal to the sum of the numerators.

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## Illustrations.

(a) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/7$
2 full sisters	..	..	..	..	$2/3=4/6$ "	$4/7$
					<hr/>	<hr/>
					$7/6$	$1$

*Note.*—The sum total of  $1/2$  and  $2/3$  exceeds unity. The fractions are therefore reduced to a common denominator, which, in this case, is 6. The sum of the numerators is 7, and the process consists in substituting 7 for 6 as the denominator of the fractions  $3/6$  and  $4/6$ . By so doing the total of the shares equals unity. The doctrine of "Increase" is so called because it is by increasing the denominator from 6 to 7 that the sum total of the shares is made equal to unity.

(b) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/7$
Full sister	..	..	..	..	$1/2=3/6$ "	$3/7$
C. sister	..	..	..	..	$1/6=1/6$ "	$1/7$
					<hr/>	<hr/>
					$7/6$	$1$
(c) 2 full sisters	..	..	..	..	$2/3=4/6$ reduced to	$4/7$
2 u. brothers (each taking $1/6$ )	..	..	..	..	$1/3=2/6$ "	$2/7$
Mother	..	..	..	..	$1/6=1/6$ "	$1/7$
					<hr/>	<hr/>
					$7/6$	$1$
(d) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/8$
2 full sisters	..	..	..	..	$2/3=4/6$ "	$4/8$
Mother	..	..	..	..	$1/6=1/6$ "	$1/8$
					<hr/>	<hr/>
					$8/6$	$1$
(e) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/8$
Full sister	..	..	..	..	$1/2=3/6$ "	$3/8$
3 u. sisters (each taking $1/9$ )	..	..	..	..	$1/3=2/6$ "	$2/8$
					<hr/>	<hr/>
					$8/6$	$1$
(f) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/9$
2 full sisters	..	..	..	..	$2/3=4/6$ "	$4/9$
2 u. sisters and 1 u. brother (each taking $1/9$ )	..	..	..	..	$1/3=2/6$ "	$2/9$
					<hr/>	<hr/>
					$9/6$	$1$
(g) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/9$
Full sister	..	..	..	..	$1/2=3/6$ "	$3/9$
2 u. sisters and 2 u. brothers (each $1/12$ )	..	..	..	..	$1/3=2/6$ "	$2/9$
Mother	..	..	..	..	$1/6=1/6$ "	$1/9$
					<hr/>	<hr/>
					$9/6$	$1$
(h) Husband	..	..	..	..	$1/2=3/6$ reduced to	$3/10$
2 full sisters	..	..	..	..	$1/3=4/6$ "	$4/10$
3 u. sisters and 5 u. brothers (each $1/24$ )	..	..	..	..	$1/3=2/6$ "	$2/10$
Mother	..	..	..	..	$1/6=1/6$ "	$1/10$
					<hr/>	<hr/>
					$10/6$	$1$

(i)	Widow .. .. .	$1/4=3/12$	reduced to	$3/13$
	3 c. sisters .. .. .	$2/3=8/12$	"	$8/13$
	Mother .. .. .	$1/6=2/12$	"	$2/13$
		<hr/>		<hr/>
		$13/12$		$1$
(j)	Husband. .. .. .	$1/4=3/12$	reduced to	$3/13$
	Mother .. .. .	$1/6=2/12$	"	$2/13$
	2 daughters .. .. .	$2/3=8/12$	"	$8/13$
		<hr/>		<hr/>
		$13/12$		$1$
(k)	Husband .. .. .	$1/4=3/12$	reduced to	$3/13$
	Mother .. .. .	$1/6=2/12$	"	$2/13$
	Daughter .. .. .	$1/2=6/12$	"	$6/13$
	Son's daughter .. .. .	$1/6=2/12$	"	$2/13$
		<hr/>		<hr/>
		$13/12$		$1$
(l)	Widow .. .. .	$1/4=3/12$	reduced to	$3/13$
	Mother .. .. .	$1/3=4/12$	"	$4/13$
	Full sister .. .. .	$1/2=6/12$	"	$6/13$
		<hr/>		<hr/>
		$13/12$		$1$
(m)	Widow .. .. .	$1/4=3/12$	reduced to	$3/15$
	2 full sisters .. .. .	$2/3=8/12$	"	$8/15$
	2 u. sisters .. .. .	$1/3=4/12$	"	$4/15$
		<hr/>		<hr/>
		$15/12$		$1$
(n)	Widow .. .. .	$1/4=3/12$	reduced to	$3/15$
	2 full sisters .. .. .	$2/3=8/12$	"	$8/15$
	U. sister .. .. .	$1/6=2/12$	"	$2/15$
	Mother .. .. .	$1/6=2/12$	"	$2/15$
		<hr/>		<hr/>
		$15/12$		$1$
(o)	Husband .. .. .	$1/4=3/12$	reduced to	$3/15$
	Father .. .. .	$1/6=2/12$	"	$2/15$
	Mother .. .. .	$1/6=2/12$	"	$2/15$
	3 daughters .. .. .	$2/3=8/12$	"	$8/15$
		<hr/>		<hr/>
		$15/12$		$1$
(p)	Widow .. .. .	$1/4=3/12$	reduced to	$3/17$
	2 full sisters .. .. .	$2/3=8/12$	"	$8/17$
	2 u. sisters .. .. .	$1/3=4/12$	"	$4/17$
	Mother .. .. .	$1/6=2/12$	"	$2/17$
		<hr/>		<hr/>
		$17/12$		$1$
(q)	Wife .. .. .	$1/8=3/24$	reduced to	$3/27$
	2 daughters .. .. .	$2/3=16/24$	"	$16/27$
	Father .. .. .	$1/6=4/24$	"	$4/27$
	Mother .. .. .	$1/6=4/24$	"	$4/27$
		<hr/>		<hr/>
		$27/24$		$1$

Str. 29-30.—For cases in which the total of the shares is less than unity, see sec. 53 below.

## C.—Residuaries.

**52. Residuaries.**—If there are no Sharers, or if there are Sharers, but there is a residue left after satisfying their claims, the whole inheritance or the residue, as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 58A).

*Illustrations.*

[*Note.*—The residue remaining after satisfying the sharers' claims is indicated in the following illustrations thus.]

**No. 1. Sons and daughters.**

(a) Son	..	..	..	..	$\frac{2}{3}$	} (as residuaries).
Daughter	..	..	..	..	$\frac{1}{3}$	

*Note.*—The daughter cannot inherit as a sharer when there is a son. But if the heirs be a daughter and a son's son, the daughter as a sharer will take  $\frac{1}{2}$ , and the son's son as a residuary will take the remaining  $\frac{1}{2}$ .

(b) 2 sons	..	..	..	..	$\frac{4}{7}$	(as residuaries, each son taking $\frac{2}{7}$ )
3 daughters	..	..	..	..	$\frac{3}{7}$	(as residuaries, each daughter taking $\frac{1}{7}$ )

(c) Widow	..	..	..	..	$\frac{1}{8}$	(as sharer)
Son	..	..	..	..	$\frac{2}{3}$ of $(\frac{7}{8}) = \frac{7}{12}$	} (as residuaries)
Daughter	..	..	..	..	$\frac{1}{3}$ of $(\frac{7}{8}) = \frac{7}{24}$	

*Note.*—The residue after payment of the widow's share is  $\frac{7}{8}$ .

(d) Husband	..	..	..	..	$\frac{1}{4}$	(as sharer)
Mother	..	..	..	..	$\frac{1}{6}$	(as sharer)
Son	..	..	..	..	$\frac{2}{3}$ of $(\frac{7}{12}) = \frac{7}{18}$	} (as residuaries)
Daughter	..	..	..	..	$\frac{1}{3}$ of $(\frac{7}{12}) = \frac{7}{36}$	

*Note.*—The residue in the above case is  $1 - (\frac{1}{4} + \frac{1}{6}) = \frac{7}{12}$ . If there were two sons and three daughters, each son would take  $\frac{2}{7}$  of  $\frac{7}{12} = \frac{1}{6}$ , and each daughter  $\frac{1}{7}$  of  $\frac{7}{12} = \frac{1}{12}$ .

**No. 2. Son's Sons h.l.s. and Son's daughters h.l.s.**

(e) Son's son	..	..	..	..	$\frac{2}{3}$	} (as residuaries)
Son's daughter	..	..	..	..	$\frac{1}{3}$	

*Note.*—Where there is a son's son, the son's daughter cannot inherit as a sharer but she inherits as a residuary with him. Similarly, a son's son's daughter cannot inherit except as a residuary when there is a son's son's son.

(f) 2 daughters	..	..	..	..	$\frac{2}{3}$	(as sharers)
Son's son	..	..	..	..	$\frac{1}{3}$	(as residuaries)
Son's son's son	..	..	..	..	..	(excluded by son's son)
Son's son's daughter	..	..	..	..	..	(excluded both by daughters and son's son. See Tab. of Sh., No. 8)
(g) 2 daughters	..	..	..	..	$\frac{2}{3}$	(as sharers)
Son's son	..	..	..	..	$\frac{2}{3}$ of $(\frac{1}{3}) = \frac{2}{9}$	} (as residuaries)
Son's daughter	..	..	..	..	$\frac{1}{3}$ of $(\frac{1}{3}) = \frac{1}{9}$	

(h) Daughter .. .. .	1/2	(as sharer)
Son's son .. .. .	2/3 of (1/2)=1/3	{ (as residuaries)
Son's daughter .. .. .	1/3 of (1/2)=1/6	

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*Note.*—There being only one daughter, the son's daughter would have taken 1/6 as sharer (see Tab. of Sh., No. 8), if the deceased had not left a son's son. But as the son's son is one of the heirs, the son's daughter can inherit only as a residuary with the son's son.

(i) Son's daughter .. .. .	1/2	(as sharer)
Son's son's son .. .. .	1/2	(as residuary)

*Note.*—In this case the son's daughter is not precluded from inheriting as a sharer for there is no relation who would preclude her from succeeding as a sharer (see Tab. of Sh., No. 8, 3rd column). And it will be seen on referring to the Table of Residuaries that the only case in which the son's daughter inherits as a residuary with the son's son's son (who is a lower son's son) is where she is precluded from succeeding as a sharer [see ill. (k) below].

(j) Daughter .. .. .	1/2	(as sharer)
Son's daughter .. .. .	1/6	(as sharer see Tab. of Sh., No. 8)
Son's son's son .. .. .	2/3 of (1/3)=2/9	{ (as residuaries)
Son's son's daughter. 1/3 of (1/3)=1/9		

*Note.*—There being only one daughter, the son's daughter is entitled to 1/6 as a sharer. Since she is not precluded from inheriting as a sharer, she does not become a residuary with the son's son's son (who is a lower son's son).

(k) 2 daughters .. .. .	2/3	(as sharers)
Son's daughter .. .. .	1/3 of (1/3)=1/9	{ (as residuaries)
Son's son's son .. .. .	2/3 of (1/3)=2/9	

*Note.*—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a lower son's son).

(l) 2 son's daughters .. .. .	2/3	(as sharers)
Son's son's son .. .. .	2/3 of (1/3)=2/9	{ (as residuaries)
Son's son's daughter. 1/3 of (1/3)=1/9		

*Note.*—The son's daughters in this case do not inherit as residuaries with the son's son's son, for they are not precluded from inheriting as sharers.

(m) 2 daughters .. .. .	2/3	(as sharers)
Son's son's son .. .. .	2/4 of (1/3)=1/6	{ (as residuaries)
Son's daughter .. .. .	1/4 of (1/3)=1/12	
Son's son's daughter .. .. .	1/4 of (1/3)=1/12	

*Note.*—There being two daughters, the son's daughter cannot inherit as a sharer. She therefore inherits as a residuary with the son's son's son (who is a lower son's son). The son's son's daughter is entitled to inherit as a residuary with the son's son's son who is an equal son's son in relation to her. Both these female relations inherit therefore as residuaries with the son's son's son, each taking 1/12. This illustration presents two peculiar features. The one is that the son's son's daughter, though remoter in degree, shares with the son's daughter. The other is that the son's daughter succeeds as a residuary with a lower son's son. If this were not so, the son's son's daughter would inherit to the exclusion of the son's daughter, a result directly opposed to the principle that the nearest of blood must take first (Sir. 18-19).

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## No. 3. Father.

(n) <i>Father</i> .. .. .	1/6	(as sharer)
<i>Son (or son's son h.l.s.)</i> ..	5/6	(as residuary)

*Note.*—Here the father inherits as a sharer. See Table of Sh., No. 1.

(o) <i>Mother</i> .. .. .	1/3	(as sharer)
<i>Father</i> .. .. .	2/3	(as residuary)

*Note.*—Here the father inherits as a residuary, as there is no child or child of a son h.l.s. See Table of Sh., No. 1.

(p) <i>Daughter</i> .. .. .		(as sharer)=1/2
<i>Father</i> .. .. .	1/6 (as sharer)+1/3	(as residuary)=1/12

*Note.*—Here the father inherits both as a sharer and residuary. He inherits as a sharer, for there is a daughter, and he inherits the residue 1/3 as a residuary, for there are neither sons nor son's sons h.l.s. The father may inherit *both* as a sharer and residuary. He inherits simply as a sharer when there is a son or son's son h.l.s. [see ill. (n) above]. He inherits simply as a residuary when there are neither children nor children of sons h.l.s. [see ill. (o) above]. He is both a sharer and a residuary when there are only daughters or son's daughters (h.l.s.), but no sons or son's sons h.l.s. as in the present illustration. The same remarks apply to the true grandfather h.h.s. In fact the father and the true grandfather are the only relations who can inherit in *both* capacities simultaneously.

## No. 4. True Grandfather h.h.s.

*Note.*—Substitute "true grandfather" for "father" in ills. (n), (o) and (p). The true grandfather will succeed in the same capacity and will take the same share as the father in those illustrations.

## Nos. 5 &amp; 7. Brothers and sisters.

(q) <i>Husband</i> .. .. .	1/2	(as sharer)
<i>Mother</i> .. .. .	1/6	(as sharer)
<i>Brother</i> .. .. .	2/3 of (1/3)=2/9	(as residuaries)
<i>Sister</i> .. .. .	1/3 of (1/3)=1/9	

*Note.*—The sister cannot inherit as a sharer when there is a brother, but she takes the residue with him.

<i>Full brother (e)</i> .. .. .	2/3	(as residuary)
<i>Full sister</i> .. .. .	1/3	(as residuary)
<i>Con. sister</i> .. .. .	0	(excluded by full brother)

## No. 6. Full sisters with daughters and sons' daughters.

(r) <i>Daughter (or son's daughter</i>		
<i>h.l.s.)</i> .. .. .	1/2	(as sharer)
<i>Full sister</i> .. .. .	1/2	(as residuary No. 6)
<i>Brother's son</i> .. .. .	0	(excluded by full sister who is a nearer residuary)

*Note.*—The full sister inherits in *three* different capacities: (1) as a sharer under the circumstances set out in the Table of Sharers; (2) as a residuary with full brother when there is a brother; and, failing to inherit in either of these two capacities, (3) as a residuary with daughters, or son's daughters h.l.s. or

e) *Abdul Karim v. Mat. Amat-ul-Habib* |  
(1922) 3 Lah. 397, 70 I.C. 205, |

(23) A.L. 121.

one daughter and a son's daughter h.l.s. provided there is no nearer residuary. Thus in the present illustration, the sister cannot inherit as a sharer, because there is a daughter (or son's daughter h.l.s.). And as there is no brother, she cannot inherit in the second of the three capacities enumerated above. She therefore takes the residue  $\frac{1}{2}$  as a residuary with the daughter (or son's daughter), for there is no residuary nearer in degree. If this were not so, the brother's son, who is a more remote relation, would succeed in preference to her.

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(s) 2 daughters (or son's daughters h.l.s.)	..	2/3	(as sharers)	
Full sister	..	1/3	(as residuary No. 6)	
(t) 2 daughters (f)	..	2/3	(as sharers)	
Husband	..	1/4	(as sharer)	
Full sister	..	1/12	(as residuary No. 6)	
Father's pat. uncle's son	..	0	(excluded by full sister who is a nearer residuary)	
(u) Daughter	..	1/2	(as sharer)	
Son's daughter	..	1/6	(as sharer)	
Full sister	..	1/3	(as residuary No. 6)	
(v) Daughter	..	1/2	(as sharer)	
Son's daughter	..	1/6	(as sharer)	
Mother	..	1/6	(as sharer)	
Full sister	..	1/6	(as residuary No. 6)	
(w) Daughter	..	1/2	(as sharer)	
Son's daughter	..	1/6	(as sharer)	
Husband	..	1/4	(as sharer)	
Full sister	..	1/12	(as residuary No. 6)	
(x) Daughter	..	1/2	(as sharer)=6/12 reduced to 6/13	
Son's daughter	..	1/6	(as sharer)=2/12	2/13
Husband	..	1/4	(as sharer)=3/12	3/13
Mother	..	1/6	(as sharer)=2/12	2/13
Full sister	..	0	(excluded)	
		13/12		1

*Note.*—Here the only capacity in which the full sister could inherit is that of a residuary with the daughter and son's daughter. But the residuary succeeds to the residue, if any, after the claims of the sharers are satisfied, and in the present case there is no residue. The sum total of the sharers exceeds unity, and the case is one of "Increase."

#### No. 8. Consanguine sisters with daughters and sons' daughters h.l.s.

*Note.*—Consanguine sisters inherit as residuaries with daughters and sons' daughters in the absence of full sisters. Substitute "consanguine sister" for "full sister" in ill. (r) to (x), and the shares of the several heirs will remain the same, the consanguine sister taking the place of the full sister. Substituta also in the note to ill. (r) "consanguine brother" for "full brother."

#### Other Residuaries.

(y) Full sister	..	1/2	(as sharer)
C. sister	..	1/6	(as sharer)
Mother	..	1/6	(as sharer)
Brother's son	..	1/6	(as residuary)



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(z) Widow	.. ..	1/4 (as sharer)
Mother	.. ..	1/3 (as sharer)
Pat. uncle	.. ..	5/12 (as residuary)
(aa) Full sister (g)	.. ..	1/2 (as sharer)
Pat. uncle's sons	.. ..	1/2 (as residuaries)

Sir. 18-21 and 23-26. Some of the important points involved in the Table of Residuaries are explained in the notes appended to the illustrations.

**Classification of Residuaries.**—All residuaries are related to the deceased through a male. The uterine brother and sister are related to the deceased through a female, that is, the mother, and they do not therefore find a place in the List of Residuaries. The *Sarajyyah* divides residuaries into three classes, viz., (1) residuaries in their own right: these are all males comprised in the List of Residuaries; (2) residuaries in the right of another: these are the four female residuaries, namely, the daughter as a residuary in the right of the son, the son's daughter h.l.s. as a residuary in the right of the son's son h.l.s., the full sister in the right of the full brother, and the consanguine sister in the right of the consanguine brother; and (3) residuaries with others, namely, the full sister and consanguine sister, when they inherit as residuaries with daughters and sons' daughters h.l.s. But if regard is to be had to the order of succession, residuaries may be divided into four classes, the first class comprising descendants of the deceased, the second class his ascendants, the third the descendants of the deceased's father, and the fourth the descendants of the deceased's true grandfather h.l.s. This classification has been adopted in the Table of Residuaries. The division of Distant Kindred into four classes proceeds upon the same basis.

**Residuaries that are primarily Sharers.**—It will be noticed on referring to the Tables of Sharers and Residuaries that there are six sharers who inherit under certain circumstances as residuaries. These are the father and true grandfather h.l.s., the daughter and son's daughter h.l.s., and the full sister and consanguine sister. Of these, only the father and true grandfather inherit in certain events both as sharers and residuaries (see ill. (p) above, and the note thereto). In fact they are the only relations who can inherit at the same time in a double capacity. The other four, who are all females, inherit either as sharers or residuaries. The circumstances under which they inherit as sharers are set out in the Table of Sharers. They succeed as residuaries and can succeed in that capacity alone, when they are combined with male relations of a parallel grade. Thus the daughter inherits as a sharer when there is no son. But when there is a son, she inherits as a residuary, and can inherit in that capacity alone; not that when there is a son she is excluded from inheritance, but that in that event she succeeds as a residuary, the presence of the son merely altering the character of her heirship. Similarly, the son's daughter h.l.s. inherits as a residuary when there is an equal son's son. And in like manner, the full sister and consanguine sister succeed as residuaries when they co-exist with the full brother and consanguine brother respectively. The curious reader may ask why it is that the said four female relations are precluded from inheriting as sharers when they exist with males of parallel grade. The answer appears to be this, that if they were allowed to inherit as sharers under those circumstances, it might be that no residue would remain for the corresponding males (all of whom are residuaries only), that is to say, though the females would have a share of the inheritance, the corresponding males, though of an equal grade, might have no share of the inheritance at all. To take an example: A dies leaving a husband, a father, a mother, a daughter, and a son. The husband will take 1/4, the father 1/6, and the mother 1/6. If the daughter were allowed

(g) *Mst. Ghulam v. Nur Hasan* (1922) 3  
Lah. 278, 69 I.C. 1000, ('22) A.L.

to inherit as a sharer, her share would be  $1/2$ , and the total of the shares would then be  $13/12$ , so that no residue would remain for the son. It is, it seems, to maintain a residue for the males that the said females are precluded from inheriting as sharers when they co-exist with corresponding male relations.

The principle which regulates the successions of full and consanguine sisters as residuaries with daughters and son's daughter h.l.s. is explained in the notes appended to ill. (r).

**Female residuaries.**—There are two more points to be noted in connection with female residuaries, which are stated below.

(1) The female residuaries are four in number, of whom two are descendants of the deceased, namely, the daughter and son's daughter h.l.s., and the other two are descendants of the deceased's father, namely, the full sister and consanguine sister. *No other female can inherit as a residuary.*

(2) All the four females inherit as residuaries with corresponding males of a parallel grade. But none of these except the son's daughter h.l.s. can succeed as a residuary with a male lower in degree than herself. Thus the daughter cannot succeed as a residuary with the son's son, nor the sister with the brother's son; but the son's daughter may inherit as a residuary not only with the son's son but with the son's son's son or other lower son's son: see ill. (m) and the note thereto.

**Principles of succession among Sharers and Residuaries.**—It will be seen from the Tables of Sharers and Residuaries that certain relations entirely exclude others from inheritance. This proceeds upon the following principles laid down in the *Sarajyyah* in the part headed "Of Exclusion":—

(1) "*Whoever is related to the deceased through any person shall not inherit while that person is living*" (Sir. 27). Thus the father excludes brothers and sisters. And since uterine brothers and sisters are related to the deceased through the mother, it must follow that they should be excluded by the mother. A reference, however, to the Table of Sharers will show that these relations are not excluded by the mother. The reason is that the mother, when she stands alone, is not entitled to the whole inheritance in one and the same capacity as the father would, be if he stood alone, but partly as a sharer and partly by "Return" (Sir. 27; *Sharifyyah*, 49). Thus if the father be the sole surviving heir he will succeed to the whole inheritance as a residuary. But if the mother be the sole heir will take  $1/3$  as sharer, and the remaining  $2/3$  by Return (see sec. 53 below). For this reason the mother does not exclude the uterine brother and sister from inheriting with her.

(2) "*The nearest of blood must take*" (Sir. 27), that is, the nearer in degree exclude the more remote. The exclusion of the true grandfather by the father, of the true grandfather by the mother, of the son's son by the son, etc., rests upon this principle. These cases may also be referred to the first principle set out above.

It will have been seen that the daughter, though she is nearer in degree, does not exclude the brother's son or his son. Thus if the surviving relations be a daughter and a brother's son, the daughter takes  $1/2$ , and the brother's son takes the residue. The reason is that the daughter in this case inherits as a sharer, and the brother's son as a residuary, and the principle laid down above applies only as between relations belonging to the same class of heirs. The above principle may, therefore, be read thus: "*Within the limits of each class of heirs, the nearer in degree excludes the more remote.*"

Again, it will have been seen that the father, though nearer in degree, does not exclude the mother's mother or her mother; nor does the mother exclude the father's father or his father. The reason is that the above principle is to be read with further limitations, which we shall proceed to enumerate. These

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limitations are nowhere stated in the *Sirajiyah* or in any other work of authority, but they appear to have been tacitly recognized in the rules governing succession among Sharers and Residuaries.

(3) After stating the two principles mentioned above, the *Sirajiyah* (p. 28) goes on to say that "a person excluded may, as all the learned agree, exclude others." See illa. (e), (g) and (q) to sec. 50 above, and the note to ill. (e).

There are five heirs that are *always* entitled to some share of the inheritance, and they are in no case liable to exclusion. These are (1) the child, i.e., son or daughter, (2) father, (3) mother, (4) husband, and (5) wife (*Sir.* 27). These are the most favoured heirs, and we shall call them, for brevity's sake, Primary Heirs. Next to these, there are three, namely, (1) child of a son, h.l.s., (2) true grandfather h.h.s. and (3) true grandmother h.h.s. These three are the *Substitutes* of the corresponding primary heirs. The husband and wife can have no substitute. The following two lines indicate at a glance the primary heirs and their substitutes:—

<i>Primary heirs</i>	..	Child.		Father.		Mother.
<i>Substitutes</i>	..	Child of a son h.l.s.	Tr.	GF.	Tr.	GM.

The right of succession of the substitutes is governed by the following rules:—

(1) No substitute is entitled to succeed so long as there is the corresponding primary heir. To this there is an exception, and that is when there is no son, but a daughter and a son's daughter in which case the daughter takes 1/2, and the son's daughter (though a substitute) takes 1/6: see Tab. of Sh., No. 8.

(2) The child of a son h.l.s. is always entitled to succeed, when there is no child.

(3) The Tr. GF. is always entitled to succeed, when there is no father.

(4) The mother's mother is always entitled to succeed, when there is no mother. The father's mother is always entitled to succeed, if there be no mother and no father.

(5) All relations who are excluded by primary heirs are also excluded by their substitutes. Thus full and consanguine sisters and uterine brothers and sisters are excluded by the *child* and the *father*. They are also excluded therefore by the *child of a son h.l.s.* and by the true *grandfather* (h).

**Residue.**—The son, being a residuary, is entitled to the *residue* left after satisfying the claims of sharers. At the same time it must have been seen that a son is *always* entitled to some share of the inheritance. To enable the son to participate in the inheritance in *every case*, it is necessary that some residue must always be left when the son is one of the surviving heirs, and this, in fact, is always so; for the shares are so arranged and the rules of succession are so framed that when the son is one of the heirs, some residue invariably remains. And since in the absence of the father the true grandfather h.h.s. is entitled to some participation in the inheritance, it will be found that in every case where he is one of the surviving heirs some residue is always left. No case of "increase" can therefore take place when these residuaries are amongst the surviving heirs.

(A) It may here be stated that though, according to the opinion of Abu Hanifa, the true grandfather excludes brothers and sisters whether full or consanguine, he does not exclude them according to the view of Abu Yusuf and

Muhammad, but is put to his election as between certain shares (*Sir.* 40-42). But the latter view is not generally adopted, and it is unnecessary to set it out here.

53. **Return (Radd).**—If there is a residue left after satisfying the claims of Sharers, but there is no Residuary, the residue reverts to the Sharers in proportion to their shares. This right of reverter is technically called "Return" or *Radd*. Ch. VII,  
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**Exception.**—Neither the husband nor the wife is entitled to the *Return* so long as there is any other heir, whether he be a Sharer or a Distant Kinsman. But if there be no other heir, the residue will go to the husband or the wife, as the case may be by *Return*.

*Illustrations.*

(a) A Mahomedan dies leaving a widow as his sole heir. The widow will take  $\frac{1}{4}$  as sharer, and the remaining  $\frac{3}{4}$  by *Return*. The surplus  $\frac{3}{4}$  does not escheat to the Crown: *Mahomed Arshad v. Sajida Banoo* (i); *Bafatun v. Blaiti Khanum* (j); *Mir Isab v. Isab* (k).

(b) Husband .. ..	1/2	
Mother .. ..	1/2	(1/3 as sharer and 1/6 by Return)

*Note.*—The husband is not entitled to the *Return*, as there is another sharer, the mother. The surplus  $\frac{1}{6}$  will therefore go to the mother by *Return*.

(c) Husband .. ..	1/4	
Daughter .. ..	3/4	(1/2 as sharer and 1/4 by Return)
(d) Wife .. ..	1/4	
Sister (f. or c.) .. ..	3/4	(1/2 as sharer and 1/4 by Return)
(e) Wife .. ..	1/8	
Son's daughter .. ..	7/8	(1/2 as sharer and 3/8 by Return)
(f) Mother .. ..	1/6 increased to	1/4
Son's daughter .. ..	1/2=3/6 "	3/4

	4/6	1
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*Note.*—In this and in illustrations (g) to (k) it will be observed that neither the husband nor the wife is among the surviving heirs. The rule in such a case is to reduce the fractional shares to a common denominator, and to decrease the denominator of those shares so as to make it equal to the sum of the numerators. Thus in the present illustration, the original shares, when reduced to a common denominator, are  $\frac{1}{6}$  and  $\frac{3}{6}$ . The total of the numerators is  $1+3=4$ , and the ultimate shares will therefore be  $\frac{1}{4}$  and  $\frac{3}{4}$  respectively.

(g) Father's mother .. ..	1/6 increased to	1/5 (each taking 1/10)
Mother's mother .. ..	1/6	1/5
2 daughters .. ..	2/3=4/6 "	4/5

	5/6	1
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(h) Mother .. ..	1/6 increased to	1/5
Daughter .. ..	1/2=3/6 "	3/5
Son's daughter .. ..	1/6 "	1/5

	5/6	1
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(i) (1878) 8 Cal. 702.  
(j) (1903) 30 Cal. 683.

(k) (1920) 44 Bom. 947, 58 I.C. 48.

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(i) Father's mother .. ..	1/6 increased to 1/5	
Mother's mother .. ..		
Full sister .. ..	$1/2 = 3/6$ ..	3/5
C. sister .. ..	$1/6$ ..	1/5
	<hr/>	<hr/>
	5/6	1
(j) Full sister .. ..	$1/2 = 3/6$ increased to 3/5	
C. sister .. ..	$1/6$ ..	1/5
U. sister .. ..	$1/6$ ..	1/5
	<hr/>	<hr/>
	5/6	1
(k) Mother .. ..	$1/6$ increased to 1/5	
Full sister .. ..	$1/2 = 3/6$ ..	3/5
U. brother .. ..	$1/6$ ..	1/5
	<hr/>	<hr/>
	5/6	1
(l) Husband .. ..	$1/4$ ..	= 4/16
Mother .. ..	$1/6$ increased to 1/4 of (3/4)	= 3/16
Daughter .. ..	$1/2 = 3/2$ ..	= 9/16
	<hr/>	<hr/>
	11/12	1

*Note.*—In this and in ills. (m) to (r), it will be observed that either the husband or the wife is one of the surviving heirs. Since neither the husband nor the wife is entitled to the Return when there are other sharers, his or her share will remain the same, and the shares of the others will be increased by reducing them to a common denominator, and then decreasing the denominator of the original fractional share so as to make it equal to the sum of the numerators, and multiplying the new fractional shares thus obtained by the residue after deducting the husband's or wife's share. Thus in the present illustration the shares of the mother and daughter, when reduced to a common denominator, are  $1/6$  and  $3/6$  respectively. The total of the numerators is  $1+3=4$ , and the new fractional shares will thus be  $1/4$  and  $3/4$  respectively. The residue after deducting the husband's share is  $3/4$ , and the ultimate shares of the mother and daughter will therefore be  $1/4$  of  $3/4=3/16$  and  $3/4$  of  $3/4=9/16$  respectively.

(m) Wife .. ..	$1/8$ ..	= 4/32
Mother .. ..	$1/6$ increased to 1/4 of (7/8)	= 7/32
Daughter .. ..	$1/2 = 3/6$ ..	= 21/32
	<hr/>	<hr/>
	19/24	1
(n) Wife .. ..	$1/8$ ..	= 5/40
Mother .. ..	$1/6$ increased to 1/5 of (7/8)	= 7/40
2 sons' daughters.. ..	$4/6$ ..	= 28/40
	<hr/>	<hr/>
	23/24	1
(o) Husband .. ..	$1/2$ ..	= 2/4
U. brother .. ..	$1/6$ increased to 1/2 of (1/2)	= 1/4
U. sister .. ..	$1/6$ ..	= 1/4
	<hr/>	<hr/>
	5/6	1
(p) Wife .. ..	$1/4$ ..	= 2/8
U. brother .. ..	$1/6$ increased to 1/2 of (3/4)	= 3/8
U. sister .. ..	$1/6$ ..	= 3/8
	<hr/>	<hr/>
	7/12	1

(q) <i>Wife</i> .. ..	1/4	=	4/16
<i>Full sister</i> .. ..	1/2 = 3/6 increased to 3/4 of (3/4)	=	9/16
<i>U. sister</i> .. ..	1/6 " 1/4 of (3/4)	=	3/16
	<u>11/12</u>		<u>1</u>
(r) <i>Wife</i> .. ..	1/4	=	1/4
<i>U. brother</i> .. ..	1/6 increased to 1/3 of (3/4)	=	1/4
<i>U. sister</i> .. ..	1/6 " 1/3 of (3/4)	=	1/4
<i>Mother</i> .. ..	1/6 " 1/3 of (3/4)	=	1/4
	<u>9/12</u>		<u>1</u>
(s) <i>Husband</i> .. ..	1/2		
<i>Daughter's son</i> .. ..	1/2		

*Note.*—The daughter's son belongs to the class of distant kindred. The husband is not therefore entitled to the surplus by Return and the same will go to the daughter's son as a distant kinsman.

(t) <i>Wife</i> .. ..	1/4
<i>Brother's daughter</i> .. ..	3/4

*Note.*—The brother's daughter belongs to the class of distant kindred. The surplus will therefore go to her, as the wife is not entitled to the Return (t).

*Sir.* 37-40.

*Residuaries for special cause.*—A residuary for special cause is a person who inherits from a freed man by reason of the manumission of the latter (m). According to Mahomedan law proper, if a manumitted slave dies without leaving any residuary heir by relation, the manumitter is entitled to succeed to the residue in preference to the right of the sharers to take the residue by Return (*Sir.* 25-26). But residuaries for special cause have no place in Mahomedan law as administered by the Courts of British India since the abolition of slavery in 1843.

*Husband and wife.*—The rule of law as stated in the exception as regards the right of the husband and wife to Return is different from that set out in the *Sirajuyyah*. According to the latter authority, neither the husband nor the wife is entitled to the Return in any case, not even if there be no other heir, and the surplus goes to the Public Treasury (*Sir.* 37). "But although that was the original rule, an equitable practice has prevailed in modern times of returning to the husband or to the wife in default of other sharers by blood and distant kindred," and this practice has been adopted by our Courts. See the cases cited in ill. (a) above.

"Return" distinguished from "Increase".—Return is the converse of Increase. The case of Return takes place when the total of the shares is less than unity: the case of Increase, when the total is greater than unity. In the former case the shares undergo a rateable increase; in the latter, a rateable decrease.

*Father and true grandfather.*—When there is only one sharer, he succeeds to the whole inheritance, to his legal share as sharer, and to the surplus by Return. When the father is the sole surviving heir, he succeeds to the whole inheritance as a residuary, for he cannot inherit as a sharer when there is no child or child of a son h.l.s. (see Table of Sh., No. 1). The same remarks apply to the case of the true grandfather when he is the sole surviving heir.

(t) See *Koonari v. Dalim* (1884) 11 Cal. | (m) *Bumsey's Moohummudan Law of Inheritance*, 164.

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*D.—Distant Kindred.*

**54. Distant Kindred.**—(1) If there be no Sharers or Residuaries, the inheritance is divided amongst Distant Kindred.

(2) If the only sharer be a husband or wife, and there be no relation belonging to the class of Residuaries, the husband or wife will take his or her full share, and the remainder of the estate will be divided among Distant Kindred.

*Str. 13.* It will have been seen from the preceding section that a husband or wife, though a sharer, does not exclude distant kindred from inheritance when he or she is the sole surviving heir. See sec. 53 and ill. (s) and (t) to that section.

**55. Four Classes.**—(1) Distant Kindred are divided into four classes, namely, (1) descendants of the deceased other than sharers and residuaries; (2) ascendants of the deceased other than sharers and residuaries; (3) descendants of parents other than sharers and residuaries; and (4) descendants of ascendants how high soever other than residuaries. The descendants of the deceased succeed in priority to the ascendants, the ascendants of the deceased in priority to the descendants of parents, and the descendants of parents in preference to the descendants of ascendants.

(2) The following is a list of Distant Kindred comprised in each of the four classes:—

## I. Descendants of the deceased:—

1. Daughter's children and their descendants.
2. Children of son's daughters h.l.s. and their descendants.

## II. Ascendants of the deceased:—

1. False grandfathers h.h.s.
2. False grandmothers h.h.s.

## III. Descendants of parents:—

1. Full brothers' daughters and their descendants.
2. Con. brothers' daughters and their descendants.
3. Uterine brothers' children and their descendants.
4. Daughters of full brothers' sons h.l.s. and their descendants.
5. Daughters of con. brothers' sons h.l.s. and their descendants.
6. Sisters (f., e., or ut.) children and their descendants.

IV. Descendants of *immediate* grandparents (true or false):—

1. Full pat. uncles' daughters and their descendants.
2. Con. pat. uncles' daughters and their descendants.
3. Uterine pat. uncles and their children and their descendants.

4. Daughters of full pat. uncles' sons h.l.s. and their descendants.
5. Daughters of con. pat. uncles' sons h.l.s. and their descendants.
- 6. Pat. aunts (f., c., or ut.) and their children and their descendants.
7. Mat. uncles and aunts and their children and their descendants.

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and

descendants of *remoter* ancestors h. h. s. (true or false).

(3) The order of precedence among Distant Kindred in each class and the rules by which such order is determined are given in secs. 56 to 66.

*Sir.* 44-46. The *Sirajyyah* does not enumerate all relations belonging to the class of Distant Kindred, but mentions only some of them. Hence it was thought at one time that "distant kindred" were restricted to the specific relations mentioned in the *Sirajyyah*. But this view has long since been rejected as erroneous, and it is now firmly established that all relations who are neither sharers nor *residuary* are distant kindred (a).

### *Class I of Distant Kindred.*

**Difference between doctrines of Imam Muhammad and Abu Yusuf.**—When we come to Distant Kindred, we find that there are two sets of rules for each class, one for determining the order of succession, and the other for determining the shares. In each class we have first to determine which of the relations are entitled to succeed; this is done by applying certain rules which are called Rules of Exclusion. After so doing, we have to assign shares to those relations, this is done with the help of certain other rules.

It is when we come to the class of Distant Kindred that we find a remarkable difference of opinion between Abu Yusuf and Imam Muhammad, the two great disciples of Abu Hanifa. The doctrine of Abu Yusuf is very simple, but unhappily it has not been accepted by the Hanafi Sunnis in India. It is the doctrine of Imam Muhammad that is followed in India, and this doctrine is much too complicated (o). Moreover, the doctrine of Imam Muhammad is followed by the author of the *Sirajyyah*, and apparently by the author of the *Sharfyyah* (p). The *Fatawa Alamgiri* does not express any preference either way (q). The High Court of Calcutta has also expressed its preference for the opinion of Imam Muhammad (r). Since the opinion of Abu Yusuf is not followed in India, we have confined ourselves in the following sections to the doctrine of Imam Muhammad, and the difference between the two systems is pointed out in the notes. It must not, however, be supposed that the two systems differ in all respects and at all stages. So long as the intermediate ancestors do not differ in their sexes or blood, there is no difference at all between the two systems. The difference comes in only in those cases where the intermediate ancestors are—

- (i) of *different sexes* as where some are males and others in the same generation are females; or where they are
- (ii) of *different blood*, as where some are of whole blood and others in the same generation are of half blood.

(a) *Abdul Sarang v. Putee Bibi* (1902) 29 Cal. 788.

(o) Macnaghten, p. 9 (foot-note); Baillie's *Mohammudan Law of Inheritance*, p. 92; Ramsey's *Mohammudan Law of Inheritance*, p. 65; Ameer Ali,

Vol. II, (5th Ed.) p. 59.

(p) *Sir.* 49-50; *Shar.* 95.

(q) Baillie, 716, 717.

(r) *Akber Ali v. Adar Bibi* (1931) 58 Cal. 866, 180 I.O. 878, ('81) A.C. 155.



**Ss. 55-57** Abu Yusuf declines to take any notice of the sex or blood of *intermediate ancestors* or, as they are called "roots." According to him, regard should be had to the sex and blood of the *actual claimants*, or, as they are called, "branches." The result is that according to his doctrine, the property is to be divided in the same manner as is done among son's sons and son's daughters as residuaries, that is to say, *per capita*, each male claimant taking a share double that of each female claimant.

According to Imam Muhammad, regard should be had not only to the sex and blood of the actual claimants, but also of the intermediate ancestors.

Where the intermediate ancestors differ in their *sexes*, the two systems differ as to the *shares* to be allotted to the claimants. This difference in the shares manifests itself when claimants are *descendants* whether they be descendants of the deceased as in class I or of brothers and sisters as in class III, or of uncles and aunts as in class IV.

Where the intermediate ancestors differ in *blood*, the two systems differ as to the *order* of succession. This difference in the order of succession manifests itself in class III when the surviving relations happen to be the descendants some of full or consanguine brothers or sisters, and some of uterine brothers or sisters. It cannot manifest itself in class I and class II, for there can be no difference of blood among the intermediate ancestors in those classes. Nor can it manifest itself in class IV, where the claimants are the descendants of uncles and aunts.

Before we proceed further, we may observe that among *Residuaries* there cannot be any difference of blood or sex among intermediate ancestors as may happen among *Distant Kindred*.

**56. Rules of exclusion.**—The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order [*Sir. 47*]:—

**Rule (1).**—The nearer in degree excludes the more remote.

*Sir. 7.* Thus a daughter's son or a daughter's daughter is preferred to a son's daughter's daughter. The daughter's son and the daughter's daughter are the nearest distant kindred, and they exclude all other distant kindred.

**Rule (2).**—Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to those of Distant Kindred.

*Sir. 47.* Thus a son's daughter's son, being a child of a sharer (son's daughter) succeeds in preference to a daughter's daughter's son, who is the child of a distant kinswoman (daughter's daughter).

**57. Order of succession.**—The rules set forth in section 56 lead to the following order of succession among Distant Kindred of the first class:—

- (1) Daughters' children.
- (2) Sons' daughters' children.
- (3) Daughters' grandchildren.
- (4) Sons' sons' daughters' children.

- (5) Daughters' great-grandchildren and sons' daughters' grandchildren.  
 (6) Other descendants of the deceased in like order.

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Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Note that No. (1) belongs to the second generation, Nos. (2) and (3) to the third generation, and Nos. (4) and (5) to the fourth generation. No. (2) excludes No. (3) by reason of sec. 56, rule (2). For the same reason No. (4) excludes No. (5).

**58. Allotment of Shares.**—After ascertaining which of the descendants of the deceased are entitled to succeed, the next step is to distribute the estate among them. The distribution in this class is governed by the following rules:—

*Rule (1)*—If the intermediate ancestors *do not differ* in their sexes, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male [Sir. 47].

*Illustrations.*

- |                             |                       |
|-----------------------------|-----------------------|
| (a) Daughter's son ..       | 2/3                   |
| Daughter's daughter ..      | 1/3                   |
| (b) Daughter's son's son .. | 2/3                   |
| Daughter's son's daughter.  | 1/3                   |
| (c) 2 sons of daughter A .. | 4/5 (each taking 2/5) |
| 1 daughter of daughter B.   | 1/5                   |

*Note.*—To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the daughter, that being the portion of their respective parents, A and B.

- |   |                       |
|---|-----------------------|
| (d) 2 sons of a daughter's daughter A ..  | 4/6 (each 2/6 or 1/3) |
| 2 daughters of a daughter's daughter B .. | 2/6 (each 1/6)        |

*Note.*—To divide the estate *per stirpes* is to assign 1/2 to the two sons, and 1/2 to the two daughters.

*Doctrine of Abu Yusuf.*—The distribution will be the same according also to Abu Yusuf. In each of the above cases it will be seen that the sexes of the intermediate ancestors are the same. But if the claimants be a daughter's daughter's son and a daughter's son's daughter, the case is one in which the intermediate ancestors differ in their sexes. In such a case also, according to Abu Yusuf, the rule to be followed is Rule (1), so that the former, being a male, will take 2/3 and the latter, being a female, will take 1/3; the reason being that according to Abu Yusuf regard is to be had solely to the sexes of the claimants (see "Difference between doctrines of Imam Muhammad and Abu Usuf," p. 66). According to Imam Muhammad, regard should be had also to the sexes of the intermediate ancestors, and the distribution is to be made according to Rule (2) below, which, it will be seen, is a distribution *per stirpes*, though not entirely such as in the Shia law.

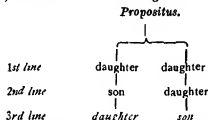
*Rule (2)*—If the intermediate ancestors *differ* in their sexes, the estate is to be distributed according to the following rules [Sir. 48-50]:—

- (a) The simplest case is where there are only two claimants, the one claiming through one line of ancestors, and

- S. 58** the other claiming through another line. In such a case, the rule is to stop at the first line of descent in which the sexes of the intermediate ancestors differ, and to assign to the male ancestor a portion double that of the female ancestor. The share of the male ancestor will descend to the claimant who claims through him, and the share of the female ancestor will descend to the claimant who claims through her, irrespective of the sexes of the claimants.

*Illustration.*

A Mahomedan dies leaving a daughter's son's daughter and a daughter's daughter's son, as shown in the following table:—



In this case, the ancestors first differ in their sexes in the second line of descent, and it is at this point that the rule of a double portion to the male is to be applied. This is done by assigning  $\frac{2}{3}$  to the daughter's son and  $\frac{1}{3}$  to the daughter's daughter. The  $\frac{2}{3}$  of the daughter's son will go to his daughter, and the  $\frac{1}{3}$  of the daughter's daughter will go to her son. Thus we have

daughter's son's daughter	.. $\frac{2}{3}$
daughter's daughter's son	.. $\frac{1}{3}$

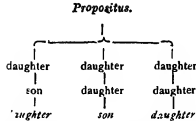
According to Abu Yusuf, the shares will be  $\frac{1}{3}$  and  $\frac{2}{3}$  respectively.

*Note.*—Where the deceased leaves descendants in the *fourth* or *remoter* generation the rule of the double share to the male is to be applied in *every successive line* in which the intermediate ancestors differ in their sexes. See ill. (b) to sub-rule (c) below.

(b) The next case is where there are three or more claimants, each claiming through a different line of ancestors. Here again, the rule is to stop at the first line in which the sexes of the intermediate ancestors differ, and to assign to each male ancestor a portion double that of each female ancestor. But in this case the individual share of each ancestor does not descend to his or her descendants as in the preceding case, but the collective share of all the male ancestors is to be divided among all the descendants claiming through them, and the collective share of all the female ancestors is to be divided among their descendants, according to the rule, as between claimants in the same group, of a double portion to the male.

*Illustrations.*

(a) A Mahomedan, dies leaving a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:—



In this case, the ancestors differ in their sex in the second line of descent. In that line we have one male and two females. The rule of the double share to the male is to be applied, first, in this line of descent, so that we have

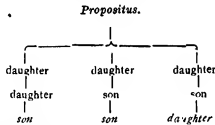
daughter's son ..	1/2	
daughter's daughter ..	1/4	} 1/2 (collective share of female ancestors).
daughter's daughter ..	1/4	

The daughter's son stands alone, and therefore his share descends to his daughter. The two female ancestors, namely, the daughters' daughters, form a group, and their collective share is  $1/2$ , which will be divided between their descendants, that is, the daughter's daughter's son and daughter's daughter's daughter, in the proportion again of two to one, the former taking  $2/3 \times 1/2 = 1/3$ , and the latter  $1/3 \times 1/2 = 1/6$ . Thus we have

daughter's son's daughter ..	$1/3 = 3/6$
daughter's daughter's son ..	$1/3 = 2/6$
daughter's daughter's daughter ..	$1/6 = 1/6$

According to Abu Yusuf, the shares will be  $1/4$ ,  $1/2$  and  $1/4$  respectively.

(b) A Mahomedan dies leaving a daughter's daughter's son, a daughter's son's son and a daughter's son's daughter, as shown in the following table:—



[In the preceding illustration we had one male and two females in the first line in which the sexes differed. In the present case, we have one female and two males in that line.]

First ascertain what is the line of descent in which the sexes first differ. That line is the second line of descent.

Next, assume the relations in that line to be so many children of the deceased and determine their shares upon that footing. The shares therefore will be, daughter's daughter  $1/5$ , and each daughter's son  $2/5$ , the collective share of the two daughters' sons being  $4/5$ . Assign the  $1/5$  of daughter's daughter to her son.

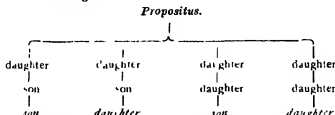
Lastly, divide the  $4/5$  of the two male ancestors between their descendants as if they were children of one ancestor, assigning a double portion to the male descendant. Thus, the daughter's son's son takes  $2/3 \times 4/5 = 8/15$ , and the daughter's son's daughter  $1/3 \times 4/5 = 4/15$ . Thus we have

daughter's daughter's son ..	$1/5 = 3/15$
daughter's son's son ..	$8/15$
daughter's son's daughter ..	$4/15$

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According to Abu Yusuf, the shares will be  $\frac{2}{5}$ ,  $\frac{2}{5}$ , and  $\frac{1}{5}$  respectively.

(c) A Mahomedan dies leaving a daughter's son's son, a daughter's son's daughter, a daughter's daughter's son, and a daughter's daughter's daughter, as shown in the following table:—



Here the ancestors first differ in their sexes in the second line, and in that line we have two males and two females. The collective share of the two males is  $\frac{4}{6}$ , and that of the two females is  $\frac{2}{6}$ . The  $\frac{4}{6}$  of the daughters' sons will be divided between the daughter's son's son and the daughter's son's daughter, the former taking  $\frac{2}{3} \times \frac{4}{6} = \frac{8}{18}$ , and the latter  $\frac{1}{3} \times \frac{4}{6} = \frac{4}{18}$ . The  $\frac{2}{6}$  of the daughter's daughters will be divided between the daughter's daughter's son and the daughter's daughter's daughter, the former taking  $\frac{2}{3} \times \frac{2}{6} = \frac{4}{18}$ , and the latter  $\frac{1}{3} \times \frac{2}{6} = \frac{2}{18}$ . Thus we have

daughter's son's son	..	..	..	$\frac{8}{18}$
daughter's son's daughter	..	..	..	$\frac{4}{18}$
daughter's daughter's son	..	..	..	$\frac{4}{18}$
daughter's daughter's daughter	..	..	..	$\frac{2}{18}$

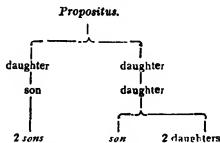
According to Abu Yusuf the shares will be  $\frac{2}{6}$ ,  $\frac{1}{6}$ ,  $\frac{2}{6}$  and  $\frac{1}{6}$  respectively.

*Note.*—When a person dies leaving descendants in the *fourth or remoter* generation “the course indicated in the [above rule] as to the first line in which the sexes differ is to be followed equally in any lower line; but the descendants of any individual or group, once separated must be kept separate throughout, in other words they must not be united in a group with those of any other individual or group” (s). See ill. (b) to sub rule (c).

(c) The last case is when there are two or more claimants claiming through the same intermediate ancestor. In such a case, there is this further rule to be applied, namely, to count for each such ancestor, if male, as many males as there are claimants claiming through him, and, if female, as many females as there are claimants claiming through her, irrespective of the sexes of the claimants.

#### Illustrations.

(a) A Mahomedan dies leaving 5 great grandchildren as shown in the following diagram:—



(s) Rumsey's Mookummudan Law of Inheritance, pp. 68-69.

Here the ancestors first differ in their sex in the second line, and in that line we have one male and one female. The daughter's son will count as two *males* by reason of his having two descendants among the claimants, and the daughter's daughter will count as *three females* by reason of her having three descendants. Thus we have

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daughter's son	..	..	..	..	4/7
daughter's daughter	..	..	..	..	3/7

The  $\frac{4}{7}$  of the daughter's son will go to his two sons. The  $\frac{3}{7}$  of the daughter's daughter will go to her descendants, the son taking  $\frac{2}{4} \times \frac{3}{7} = \frac{6}{28}$  and each daughter taking  $\frac{1}{4} \times \frac{3}{7} = \frac{3}{28}$ . Thus we have

daughter's son's sons	..	..	4/7=16/28	(each 8/28)
daughter's daughter's son	..	..	6/28	
daughter's daughter's daughters	..	..	6/28	(each 3/28)

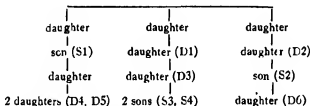
According to Abu Yusuf, the shares will be as follows:—

each daughter's son's son	..	..	2/8
daughter's daughter's son	,	..	2/8
each daughter's daughter's daughter	..		1/8

*Note.*—When the deceased leaves descendants in the *fourth or remoter* generation, the process indicated in the above rule is to be applied as often as there may be occasion to group the sexes. See the next illustration.

(b) *Note*.—The following case taken from the *Sirajiyah* illustrates the combined operation of sub-rules (a), (b) and (c), when the claimants belong to the fourth generation. See notes at the end of sub-rule (a) and sub-rule (b), and the note at the end of ill. (a) above.

A Mahomedan dies leaving 5 descendants in the fourth generation as shown in the following diagram [Str. 49]:—



Here the sexes first differ in the second line. S1 having two descendants among the claimants will count as two males or four females. D1 having two such descendants will count as two females. D2 having one such descendant only will count as one female. The estate will therefore be divided into 7 parts as follows:—

$$\left. \begin{array}{l} S_1 = 4/7; \\ D_1 = 2/7; \\ D_2 = 1/7 \end{array} \right\} 3/7 \text{ (collective share of female ancestors).}$$

S1 being by himself, his share  $\frac{4}{7}$  will pass to his two descendants D4 and D5 in equal moieties, each taking  $\frac{2}{7}$ .

The collective share  $\frac{3}{7}$  of D1 and D2 will descend to their immediate descendants D3 and S2; and here D3 having two descendants among the claimants will count as two females, and S2 having one such descendant only will count as one male, or two females. Hence the collective share  $\frac{3}{7}$  will be divided into 4 parts as follows:—

$$D_3 = \frac{2}{4} \times \frac{3}{7} = \frac{3}{14};$$

$$S_2 = \frac{2}{4} \times \frac{3}{7} = \frac{3}{14}.$$

**Ss. 58, 59** The share of D3 will pass to her two descendants S3 and S4, each taking 3/28. The share of S2 will pass to his descendants D6. The ultimate shares will therefore be—

$D4=2/7$ ;  $D5=2/7$ ;  $S3=3/28$ ;  $S4=3/28$ ;  $D6=3/14$ .

• According to Abu Yusuf, the shares will be as follows:—

$D4=1/7$ ;  $D5=1/7$ ;  $S3=2/7$ ;  $S4=2/7$ ; and  $D6=1/7$ .

### *Class II of Distant Kindred.*

**59. Order of succession.**—(1) If there be no distant kindred of the first class, the whole estate will devolve upon the mother's father as being the nearest relation among Distant Kindred of the second class [see rule (1) below].

(2) If there be no mother's father the estate will devolve upon such of the false ancestors in the third degree as are connected with the deceased through sharers, namely, the father's mother's father and the mother's mother's father, and of these two, the former, as belonging to the paternal side, will take 2/3, and the latter, as belonging to the maternal side, will take 1/3 [see rules (2) and (3) below].

Note that the father's mother and the mother's mother are sharers.

(3) If there be none of these, the estate will devolve upon the remaining false ancestors in the third degree, namely, the mother's father's father and the mother's father's mother. And as these two belong to the same (maternal) side, and as the sexes also of the intermediate ancestors are the same, the former, being a male, will take 2/3, and the latter, being a female, will take 1/3 according to sec. 58, rule (1) [*Sir.* 51-52].

Note that the two ancestors mentioned in sub-sec. (3) are both related to the deceased through a distant kinsman, namely, mother's father.

**Rules of succession.**—Succession among Distant Kindred of the second class is governed by the following rules:—

*Rule (1).*—The nearer in degree excludes the more remote.

*Rule (2).*—Among claimants in the same degree, those connected with the deceased through sharers are preferred to those connected through distant kindred.

*Rule (3).*—If there are claimants on the paternal side as well as claimants on the maternal side, assign 2/3 to the paternal side, and 1/3 to the maternal side. Then divide the portion assigned to the paternal side among the ancestors of the father, and the portion assigned to the maternal side among the ancestors of the mother, in each case according to the rules contained in sec. 58.

*Doctrine of Abu Yusuf.*—It is not clear whether when the sexes of the intermediate ancestors differ, there is the same difference of opinion between the

two disciples as there is in class I. Anyhow, no such difference can arise until 'Ch. VII, ancestors in the fourth degree are reached. Ss. 59-61

### *Class III of Distant Kindred.*

**60. Rules of exclusion.**—If there be no Distant Kindred of the first or second class, the estate devolves upon Distant Kindred of the third class. This class comprises such of the descendants of brothers and sisters as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following three rules in order [Sir. 52-54]:—

**Rule (1).**—The nearer in degree excludes the more remote.

Thus the children of brothers and sisters exclude the grandchildren of brothers and sisters. A sister's son excludes a brother's son's daughter (t).

**Rule (2).**—Among claimants in the same degree of relationship, the children of Residuaries are preferred to those of Distant Kindred.

Thus a full brother's son's daughter, being the child of a Residuary (full brother's son), is preferred to a full sister's daughter's son who is the child of a distant kinswoman (full sister's daughter). For the same reason, a consanguine brother's son's daughter is preferred to a full sister's daughter's son, though the former is of half blood and the latter of whole blood.

**Rule (3).**—Among claimants in the same degree of relationship, and not excluded by reason of Rule (2) above, the descendants of full brothers exclude those of consanguine brothers and sisters.

But the descendants of full sisters do not exclude the descendants of consanguine brothers or sisters, and the latter take the residue, if there be any, after allotting shares to the descendants of full sisters and of uterine brothers and sisters.

The descendants of uterine brothers and sisters are not excluded by descendants either of full or consanguine brothers or sisters, but they inherit with them.

Note particularly that the *test of blood* laid down in Rule (3) is not to be applied until after you have applied the test laid down in Rule (2). Among descendants of uncles and aunts these tests are to be applied in the reverse order: See notes to sec. 63 under the head "Rules of succession among descendants" [rules (3) and (4)].

**61. Order of succession.**—The above rules lead to the following order of succession among Distant Kindred of the third class:—

(t) *Agha Welayat v. Mt. Mahdub* ('42) A. Pesh. 83.



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- (1) Full brother's daughters, full sisters' children and children of uterine brothers and sisters.
- (2) Full sisters' children, children of uterine brothers and sisters, consanguine brothers' daughters and consanguine sisters' children, the consanguine group taking the residue (if any).
- (3) Consanguine brothers' daughters, consanguine sisters' children, and children of uterine brothers and sisters.
- (4) Full brothers' sons' daughters (children of Residuaries).
- (5) Consanguine brothers' sons' daughters (children of Residuaries).
- (6) Full brothers' daughters' children, full sisters' grandchildren, and grandchildren of uterine brothers and sisters.
- (7) Full sisters' grandchildren, grandchildren of uterine brothers and sisters, consanguine brothers' daughters' children and consanguine sisters' grandchildren, the consanguine group taking the residue (if any).
- (8) Consanguine brothers' daughters' children, consanguine sisters' grandchildren, and grandchildren of uterine brothers and sisters.
- (9) *Remoter descendants of brothers and sisters in like order.*

Of the above groups each in turn must be exhausted before any member of the next group can succeed.

Among the descendants mentioned above, Nos. (1) to (3) are nephews and nieces, and Nos. (4) to (8) are grandnephews and grandnieces. Note particularly that a full brother's son and a consanguine brother's son are Residuaries; hence it is that they do not find any place in the above list.

*Doctrine of Abu Yusuf.*—According to Abu Yusuf also, there are three rules of exclusion, of which the first two are the same as those laid down in the preceding section. The third rule of Abu Yusuf, which also is to be applied after applying the first two rules, is that descendants of full brothers and sisters exclude those of consanguine brothers and sisters, and the descendants of consanguine brothers and sisters exclude the descendants of uterine brothers and sisters. This difference arises from the fact that Abu Yusuf would have regard to the "blood" of the *claimants* while Imam Muhammad looks to the "blood" of the *Roots*. The result is that the order of succession according to Abu Yusuf is different from that according to Imam Muhammad.

**62. Allotment of shares.**—After ascertaining which of the descendants of brothers and sisters are entitled to succeed, the next step is to distribute the estate among them, and this is to be done by applying the following rules in order [*Sir. 53-54*]:—

*Rule (1).*—First, divide the estate among the *Roots*, that is to say, among the brothers and sisters (as if they were living) and in so doing treat each brother who has two or more claimants descended from him as so many brothers, and each sister who has two or more claimants descended from her as so many sisters. If there is a residue left after assigning their shares to the *Roots*, but there are no Resi-

duaries among the *Roots* [that is, neither a full nor consanguine brother], apply the doctrine of Return as described in section 53. The hypothetical claimants being brothers and sisters, no case of Increase is possible at all [s. 51].

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The relations constituting Distant Kindred of the third class are descendants of brothers and sisters, full, consanguine and uterine. The brothers and sisters are therefore the *Roots*. Of these, uterine brothers and sisters always inherit as sharers, one taking  $1/6$ , and two or more  $1/3$ . Full and consanguine brothers always inherit as residuaries. Full sisters inherit as sharers, if there are no full brothers, one taking  $1/2$ , and two or more  $2/3$ ; but if there are full brothers, full sisters inherit as residuaries with them. The same remarks apply to consanguine sisters. See Tab. of Sh., Nos. 9 to 12; Tab. of Res., Nos. 5-7.

If the claimants be a uterine brother and a full brother, the former takes  $1/6$ , and the latter the residue  $5/6$ . But if the claimants be two or more descendants of a uterine brother, and two or more descendants of a full brother, the hypothetical share of the uterine brother will be  $1/3$ , that being the share of two or more uterine brothers, and the hypothetical share of the full brother will be the residue  $2/3$ .

If the claimants be a uterine sister and a full sister, the former will take  $1/6$ , and the latter  $1/2$ , and the residue  $1/3$  will go to them by Return, the former taking  $1/4$  and the latter  $3/4$ . But if the claimants be 5 descendants of a uterine sister, and 9 descendants of a full sister, the hypothetical share of the uterine sister will be  $1/3$ , that being the share of two or more uterine sisters, and that of the full sister will be  $2/3$ , that being the share of two or more full sisters [see ill. (b) to Rule (3) below].

If the claimants be a full brother and a full sister, they will inherit as Residuaries, the former taking  $2/3$ , and the latter  $1/3$ . But if the claimants be 3 descendants of a full brother, and 4 descendants of a full sister, the full brother will count as three males, that is, 6 females and the full sister will count as 4 females. The property will then be divided into 10 parts, the hypothetical share of the full brother being  $6/10$ , and that of the full sister  $4/10$  [compare ill. (a) to Rule (3) below]. The position of a consanguine brother and a consanguine sister is similar to that of a full brother and a full sister [compare ill. (e) to Rule (3) below].

As to the application of the doctrine of Return to the *Roots*, see ill. (d) to rule (3) below.

**Rule (2).**—After determining the hypothetical shares of the *Roots*, the next step is to assign its share to the uterine group. If there be only one claimant in that group, assign  $1/6$  to him, that being the hypothetical share of his parent. But if there be two or more claimants in that group, whether descended from a single uterine brother, or a single uterine sister, or two or more uterine brothers or sisters, assign  $1/3$  to them, that being the hypothetical share of their parent or parents, and divide it *equally* among them without distinction of sex.

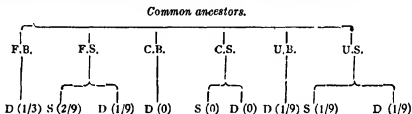
**Rule (3).**—Lastly, divide the hypothetical shares of the full and consanguine brothers and sisters among their res-

**S. 62** pective descendants as among Distant Kindred of the first class [see s. 58].

*Doctrine of Abu Yusuf.*—According to Abu Yusuf, the estate is to be divided among the claimants *per capita* according to the rule of the double share to the male.

*Illustrations.*

(a) A Sunni Mahomedan dies leaving a daughter of a full brother, a son and a daughter of a full sister, a daughter of a consanguine brother, a son and a daughter of a consanguine sister, a daughter of a uterine brother, and a son and a daughter of a uterine sister, as shown in the following diagram:—



The children of the consanguine brother and sister are excluded from inheritance as there is a full brother's daughter [see s. 60, rule (3)]. The estate has therefore to be divided among the children of the full and uterine brothers and sisters.

As there are three claimants in the uterine group, the collective share of the uterine brother and sister is  $1/3$ , and this will be divided among their three descendants equally without distinction of sex, each taking  $1/9$ .

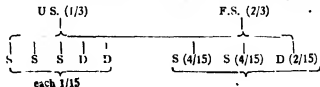
This leaves a residue of  $2/3$ , and this is to be divided in the first instance between the full brother and the full sister as Residuaries, according to the number of claimants descended from each of them. The full brother, having only one descendant, counts as one male or two females. The full sister, having two descendants, counts as two females. The residue will therefore be divided into four parts, the full brother taking  $2/4 \times 2/3 = 1/3$ , and the full sister also  $2/4 \times 2/3 = 1/3$ .

The full brother's share  $1/3$  will go to his descendant. The full sister's share  $1/3$  will be divided between her two children according to the rule of the double share to the male as in class I of Distant Kindred, the son taking  $2/3 \times 1/3 = 2/9$ , and the daughter taking  $1/3 \times 1/3 = 1/9$ .

*Note.*—On failure of children of full brother and sister, the residue will be divided in like manner among the children of consanguine brother and sister.

(According to Abu Yusuf, the whole estate will be divided among the children of the full brother and sister according to the rule of the double share to the male, so that the full brother's daughter will take  $1/4$ , the full sister's son  $1/2$ , and her daughter  $1/4$ . On failure of children of the full brother and sister, the estate will be divided in like manner among the children of consanguine brother and sister. And on failure of them, it will be distributed in like manner among the children of the uterine brother and sister).

(b) A Sunni Mahomedan dies leaving five children of a uterine sister, and three children of a full sister, as shown in the following diagram:—

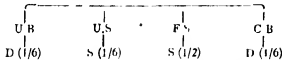


As there are five claimants in the uterine group, the share of the uterine sister is  $\frac{1}{3}$ , and this will be divided among her five children equally without distinction of sex, each taking  $\frac{1}{5} \times \frac{1}{3} = \frac{1}{15}$ . Ch. VII,  
S. 62

The full sister, having three descendants, will count as three sisters, and she will take  $\frac{2}{3}$ , that being the share of two or more full sisters [see Tab. of Sh., No. 11]. This will then be divided among her three children according to the rule of the double share to the male as among Distant Kindred of the first class, so that each son will take  $\frac{2}{5} \times \frac{2}{3} = \frac{4}{15}$ , and the daughter will take  $\frac{1}{5} \times \frac{2}{3} = \frac{2}{15}$ .

[According to Abu Yusuf, the whole estate will be divided among the children of the full sister according to the rule of the double share to the male, so that each son will take  $\frac{2}{5}$ , and the daughter will take  $\frac{1}{5}$ .]

(c) A Sunni Mahomedan dies leaving a uterine brother's daughter, a uterine sister's son, a full sister's son, and a consanguine brother's daughter, as shown in the following diagram:—



Here there is no descendant of a full brother; therefore the consanguine brother's daughter is not excluded from inheritance, and she will take what remains after the estate is divided among the other claimants.

As there are two descendants in the uterine group, the collective share of the uterine brother and sister is  $\frac{1}{3}$ , and this will be divided equally between their children without distinction of sex, each taking  $\frac{1}{6}$ .

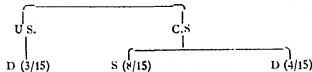
The full sister, having only one descendant, counts as one full sister, and her share therefore is  $\frac{1}{2}$ . This will descend to her son.

This leaves a residue of  $\frac{1}{6}$  which will go to the consanguine brother as a Residuary. This will descend to his daughter.

[According to Abu Yusuf, the whole estate will go to the full sister's son.]

(cc) A Sunni Mahomedan dies leaving 2 widows, 4 children of a full sister, and two daughters of a consanguine brother. The High Court of Calcutta held that the shares should be determined according to the system of Imam Muhammad. Following that system, they held that the widows were entitled to  $\frac{1}{4}$ , the full sister's children were entitled to  $\frac{2}{3}$ , and that the residue, that is,  $\frac{1}{12}$ , belonged to the consanguine brother's daughters (u).

(d) A Sunni Mahomedan dies leaving a uterine sister's daughter, and a son and a daughter of a consanguine sister, as shown in the following diagram:—



The uterine sister has only one descendant: her share therefore is  $\frac{1}{6}$ . The consanguine sister, having two descendants, counts as two consanguine sisters, and her share therefore is  $\frac{2}{3}$  [Tab. of Sh., No. 12]. This leaves the residue  $\frac{1}{6}$ , and since there is no Residuary among the *Roots*, the residue will go to the uterine sister and consanguine sister by Return. The hypothetical shares will therefore be—

uterine sister	..	..	..	$\frac{1}{6} = \frac{1}{6}$ increased to $\frac{1}{5}$
consanguine sister	.	..	..	$\frac{2}{3} = \frac{4}{6}$ " " $\frac{4}{5}$

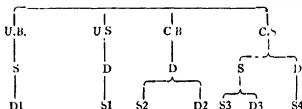
(u) Akbar Ali v. Adar Bibi (1931) 58 Cal. 866, 130 I.C. 873, ('31) A.C. 155.

**Ss. 62, 63** The uterine sister's share  $1/5$  will pass to her daughter.

The consanguine sister's share  $4/5$  will be divided between her son and daughter, the son taking  $2/3 \times 4/5 = 8/15$ , and the daughter  $1/3 \times 4/5 = 4/15$ .

[According to Abu Yusuf, the whole estate will go to the children of the consanguine sister, the son taking  $2/3$ , and the daughter  $1/3$ ].

(e) A Sunni Mahomedan dies leaving four grandnephews, S1, S2, S3, and S4, and 3 grandnieces, D1, D2, and D3, as shown in the following diagram:—



As there are two claimants in the uterine group, the collective share of the uterine brother and sister is  $1/3$ , and this will pass to D1 and S1, each taking  $1/6$ .

This leaves a residue  $2/3$ , and this is to be divided in the first instance between the consanguine brother and sister as Residuaries according to the number of claimants descended from each of them.

The consanguine brother, having two claimants descended from him, counts as two males or four females. The consanguine sister, having three claimants descended from her, counts as 3 females. The residue will therefore be divided into seven parts, the consanguine brother taking  $4/7 \times 2/3 = 8/21$ , and the consanguine sister taking  $3/7 \times 2/3 = 6/21$ .

The consanguine brother's share  $8/21$  will be divided between his two descendants S2 and D2, S2 being a male taking  $2/3 \times 8/21 = 16/63$ , and D2 being a female taking  $1/3 \times 8/21 = 8/63$ .

The consanguine sister's share  $6/21$  is to be divided in the first instance between her son and her daughter. The son, having two claimants descended from him, counts as two males or four females. The daughter, having only one claimant descended from her, counts as one female. The son will therefore take  $4/5 \times 6/21 = 8/35$ , and the daughter will take  $1/5 \times 6/21 = 2/35$ .

The son's share  $8/35$  will be divided between his two children S3 and D3 according to the rule of the double share to the male, S3 taking  $2/3 \times 8/35 = 16/105$ , and D3 taking  $1/3 \times 8/35 = 8/105$ .

The daughter's share  $2/35$  will pass to her son S4.

The shares will therefore be—

D1= $1/6$ ; S1= $1/6$ ; S2= $16/63$ ; D2= $8/63$ ; S3= $16/105$ ; D3= $8/105$ ; and S4= $2/35$ . The total of these shares is unity.

[According to Abu Yusuf, the whole property will be divided among the consanguine groups to the entire exclusion of the uterines, so that S2, S3, and S4 will each take  $2/8$  or  $1/4$ , and D2 and D3 will each take  $1/8$ ].

#### *Class IV of Distant Kindred.*

**63. Order of succession.**—(1) If there are no Distant Kindred of the first, second, or third class, the estate will devolve upon Distant Kindred of the fourth class in the order given below [Sir. 56-58]:—

(1) Paternal and maternal uncles and aunts of the deceased, other than his full and consanguine paternal uncles who are Residuaries. Ch. VII,  
Ss. 63, 64

(2) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the deceased, other than sons h.l.s. of his full and consanguine paternal uncles (they being Residuaries), the nearer excluding the more remote.

(3) Paternal and maternal uncles and aunts of the parents, other than the full and consanguine paternal uncles of the father who are Residuaries.

(4) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the parents, other than sons h.l.s. of the full and consanguine paternal uncles of the father (they being Residuaries), the nearer excluding the more remote.

(5) Paternal and maternal uncles and aunts of the grandparents, other than the full and consanguine paternal uncles of the father's father who are Residuaries.

(6) The descendants h.l.s. of all the paternal and maternal uncles and aunts of the grandparents, other than sons h.l.s. of the full and consanguine paternal uncles of the father's father (they being Residuaries), the nearer excluding the more remote.

(7) *Remoter uncles and aunts* and their descendants in like manner and order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

*Doctrine of Abu Yusuf.*—The only difference between the two disciples as regards succession of the Distant Kindred of the fourth class is as to the allotment of shares among the descendants. See sec. 65 below.

**64. Uncles and aunts.**—To distribute the estate among the uncles and aunts of the deceased, proceed as follows:—

(1) *First*, assign  $\frac{2}{3}$  to the paternal side, that is, to paternal uncles and aunts, even if there be only one such, and  $\frac{1}{3}$  to the maternal side, that is, to maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is,  $\frac{2}{3}$  of the estate, among

(a) full paternal aunts in equal shares; failing them, among

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- (b) consanguine paternal aunts in equal shares; and, failing them, among
- (c) uterine paternal uncles and aunts, according to the rule of the double share to the male.
- (3) *Lastly*, divide the portion assigned to the maternal side, that is,  $1/3$  of the estate, among
- (a) full maternal uncles and aunts; failing them among
- (b) consanguine maternal uncles and aunts; and, failing them, among
- (c) uterine maternal uncles and aunts, according to the rule, in *each* case, of the double share to the male.
- (4) If there be no uncle or aunt on the paternal side, the maternal side will take the whole. Similarly, if there be no uncle or aunt on the maternal side, the paternal side will take the whole.

Sir. 55-56.

Note that no claimant on the paternal side excludes any claimant on the maternal side, and no claimant on the maternal side excludes any claimant on the paternal side.

Note particularly that full paternal uncles and consanguine paternal uncles are *Residuous*. Hence we are not concerned with them here.

*Doctrine of Abu Yusuf*.—There is no difference between the two disciples as regards the *succession* of uncles and aunts.

*Illustrations.*

(a) $2/3$ {	Full paternal aunt	..	..	$2/3=6/9$	(excluded by full paternal aunt)
	Cons. paternal aunt	..	..	..	
$1/3$ {	Full maternal uncle	..	..	$2/3 \times 1/3 = 2/9$	(excluded by full maternal uncle and aunt)
	Full maternal aunt	..	..	$1/3 \times 1/3 = 1/9$	
	Cons. maternal uncle	..	..	..	
(b) $2/3$ {	Cons. paternal aunt	..	..	..	$2/3$
	Ut. paternal uncle	..	..	..	
					(excluded by cons. paternal aunt)
$1/3$ Full maternal aunt					$1/3$
(c) $2/3$ {	Ut. paternal uncle	..	..	$2/3 \times 2/3 = 4/9$	
	Ut. paternal aunt	..	..	$1/3 \times 2/3 = 2/9$	
$1/3$ {	Full maternal uncle	..	..	$2/3 \times 1/3 = 2/9$	
	Full maternal aunt	..	..	$1/3 \times 1/3 = 1/9$	

*Note*.—The result would be the same if the deceased left a *uterine* maternal uncle and aunt instead of a *full* maternal uncle and aunt.

(d) $\frac{2}{3}$ <i>Ut. paternal aunt</i> .. ..	$\frac{2}{3} = \frac{6}{9}$
• $\frac{1}{3}$ { <i>Cons. maternal uncle</i> ..	$\frac{2}{3} \times \frac{1}{3} = \frac{2}{9}$
<i>Cons. maternal aunt</i> ..	$\frac{1}{3} \times \frac{1}{3} = \frac{1}{9}$

Ch. VII,  
Ss. 64, 65

*Rules of succession.*—The present section is based upon the following rules —

- (1) If there are claimants on the paternal side, together with claimants on the maternal side, the former will take collectively  $\frac{2}{3}$ , and the latter  $\frac{1}{3}$ , and *each side* will then divide its own collective share according to the rule of the double share to the male.
- (2) Among claimants *on the same side*, those of the full blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations

*Order of priority.*—The uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The order of succession among the uncles and aunts of the deceased is explained in the Table on p. 88 below.

**65. Descendants of uncles and aunts.**—If there are no uncles or aunts of the deceased, the estate will devolve upon the descendants of uncles and aunts, other than sons how low soever of full paternal uncles and consanguine paternal uncles who are Residuaries. To distribute the estate among these relations, proceed as follows (*Sir*. 56-58):—

(1) *First*, assign  $\frac{2}{3}$  to the paternal side, that is, to descendants of paternal uncles and aunts, even if there be only one such, and  $\frac{1}{3}$  to the maternal side, that is, to descendants of maternal uncles and aunts, even if there be only one such.

(2) *Next*, divide the portion assigned to the paternal side, that is,  $\frac{2}{3}$  of the estate, among—

- (a) full paternal uncles' daughters; failing them, among
- (b) full paternal aunts' children; failing them, among
- (c) consanguine paternal uncles' daughters; failing them, among
- (d) consanguine paternal aunts' children; and failing them, among

(e) children of uterine paternal uncles and aunts, the division among the members of each of the five groups above to be made as among Distant Kindred of the first class [see s. 58].

Note that (a) excludes (b), the reason being that (a) are children of Residuaries (full paternal uncles), while (b) are children of Distant Kindred (full paternal aunts).



## S. 65

Note also that a full paternal uncle's son and a consanguine paternal uncle's son are Residuaries; hence they do not find any place in the above list.

(3) *Lastly*, divide the portion assigned to the maternal side, that is,  $1/3$  of the estate, among—

(a) children of full maternal uncles and aunts; failing them, among

(b) children of consanguine maternal uncles and aunts; failing them, among

(c) children of uterine maternal uncles and aunts,

the division among the members of each of the three groups above to be made as among Distant Kindred of the first class [see s. 58].

(4) If there be no children of paternal uncles and aunts, the children of maternal uncles and aunts will take the whole. Similarly, if there be no children of maternal uncles and aunts, the children of paternal uncles and aunts will take the whole.

(5) If there be no children either of paternal uncles or aunts or of maternal uncles or aunts, the estate will be divided among their grandchildren on the same principle. Failing grandchildren, it will be divided among remoter descendants, the nearer degree excluding the more remote.

The order of succession on each side is based on certain rules which are set forth below immediately after the illustrations.

*Doctrine of Abu Yusuf.*—The only difference between the two disciples as to the succession of descendants of uncles and aunts is that, according to Abu Yusuf, the portion assigned to each side is to be divided among the claimants *per capita* according to the rule of the double share to the male.

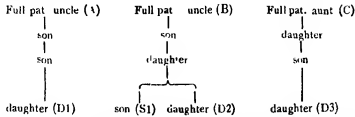
(a) The claimants are those indicated in the lowest line of the following diagram:—



Here the first difference in the sex of the ancestors occurs in the second line of descent. Therefore S1 takes  $2/3$ , and D1 takes  $1/3$ . Therefore, the share of D2 is  $2/3$  and that of S2 is  $1/3$ .

According to Abu Yusuf, D2 being a female will take  $1/3$ , and S2 being a male will take  $2/3$ .

(b) Suppose the surviving relatives to be as shown in the last line of the following diagram:— Ch. VII,  
S. 65



Here all the descendants are *equal in degree*; and they are also the same in blood, that is, they are all descendants of uncles and aunts of the *full blood*. But D1 is a child of a Residuary (full paternal uncle's son's son), while S1, D2, and D3 are children of Distant Kindred. Therefore D1 excludes S1, D2, and D3, and she will take the whole estate [see below "Rules of Succession"].

Suppose now that the surviving relations are S1, D2, and D3. In that case the distribution will be as follows:—

Here the sexes differ first in the first *huc*. As B has two claimants descended from him, he will count as two males or four females. C, having only one claimant descended from her, will count as one female. The estate will therefore be divided into five parts of which B will take 4/5 and C 1/5.

B's share 4/5 will be divided among his two descendants S1 and D2 according to the rule of the double portion to the male, so that S1 will take  $\frac{2}{3} \times \frac{4}{5} = \frac{8}{15}$ , and D2 will take  $\frac{1}{3} \times \frac{4}{5} = \frac{4}{15}$ . C's share 1/5 will descend to D3. Hence—

$$S1 = \frac{8}{15}; D2 = \frac{4}{15}; \text{ and } D3 = \frac{1}{5} = \frac{3}{15}.$$

[According to Abu Yusuf, the shares will be 1/2, 1/4 and 1/4 respectively.]

**Rules of Succession Among Descendants.**—To distribute the estate among descendants of uncles and aunts, apply the following rules in the order in which they are given below:—

*Rule (1).*—The nearer degree excludes the more remote.

*Rule (2).*—If both the paternal and maternal sides are represented, two-thirds are assigned to the paternal side and one-third to the maternal side.

*Rule (3).*—Among claimants on the same side, those of the whole blood are preferred to those of the half blood, and consanguine relations are preferred to uterine relations. [This rule applies both to the paternal and maternal sides, and it is to be applied separately to each side.]

*Rule (4).*—Among claimants on the paternal side, the children of Residuaries are preferred to those of Distant Kindred. [Thus a full paternal uncle is a Residuary; his daughters, therefore, would be the children of a residuary, and they would be preferred to the daughters of a full paternal aunt who is a Distant Kinswoman. Similarly, a consanguine paternal uncle is a Residuary; his daughters therefore would be daughters of a Residuary, and they would be preferred to the daughters of a consanguine paternal aunt. Again, a full paternal uncle's son is a Residuary; his daughters therefore would be children of a Residuary, and they would be preferred to the daughters of a full paternal uncle's daughter. Upon the same principle the daughters of a consanguine paternal uncle's son would be preferred to the daughters of a consanguine paternal uncle's daughter. This rule cannot apply to relations on the maternal side, because none of the maternal uncles is a Residuary.]

*Rule (5).*—After ascertaining which of the relations are entitled to succeed, the portion assigned to the paternal side is to be distributed among the members of that side as among Distant Kindred of the first class [sec. 58]. The portion

*Table of uncles and aunts of the deceased and their descendants up to the third generation.*

In the following Table F stands for 'full,' C for 'consanguine,' and U for 'uterine.' P stands for 'paternal' and M for 'maternal.' U stands for 'uncle' and A for 'aunt.' The small letter *s* stands for 'son,' *d* stands for 'daughter,' and *ch* for 'children.' The italics indicate Residuarys, the rest are Distant Kindred. Note that the maternal side is not excluded by the paternal side, but succeeds with members of that side.—

	Paternal side—2/3.					Maternal side—1/3				
Line of Uti. and A.	F P U	F P A	C P U	C P A	Uti. P U. & A (3)	F. M U. & A. (i)	C. M. U. & A. (ii)	Uti. M. U. & A (iii)		
1st gen.		d (1) ch (2)	d (3) ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)			
2nd gen.	<i>s</i>	d (1) ch (2) ch (2)	d (3) ch (4) ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)			
3rd gen.	<i>s</i>	d (1) ch (2) ch (2) ch (2)	d (3) ch (4) ch (4) ch (4)	ch (5)	ch (i)	ch (ii)	ch (iii)			

*Line of uncles and aunts.*—In this line, *F P U.* and *C P U.* are Residuarys. The rest are Distant Kindred, and the order of succession among them is shown in the case of paternal uncles and aunts, by the Arabic numerals (1), (2) and (3), and in the case of maternal uncles and aunts by the Roman figures (i), (ii) and (iii). See sec. 64.

*1st generation.*—If there be no uncles or aunts the estate devolves upon their children. Of these, *F. P. U.s.* and *C. P. U.s.* are Residuarys in the same manner as in the first generation. *N.s.* (1) being the child of a residuary, is preferred to the group constituted by No. (2), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (5), though they are all consanguine relations. Failing No. (1), No. (2) and No. (3) inherit together. Failing No. (3), No. (4) and No. (5) inherit together. See sec. 65.

*2nd generation.*—If there be no children of uncles and aunts, whether paternal or maternal, the estate devolves upon the grandchildren of uncles and aunts. Of these, *F. P. U.s.* and *C. P. U.s.* are Residuarys. The rest are Distant Kindred, and the order of succession among them is shown in the same manner as in the first generation. *N.s.* (1) being the child of a residuary, is preferred to the group constituted by No. (2) and No. (3), they being children of Distant Kindred, though they are all of full blood. For the same reason No. (3) is preferred to the group constituted by No. (4) and No. (5), though they are all consanguine relations. Failing No. (1), No. (2) and No. (3) inherit together. Failing No. (3), No. (4) and No. (5) inherit together. See sec. 65.

*3rd generation.*—This does not require any further explanation. All that requires to be noted is that No. (1) excludes the group constituted by No. (2), No. (2) and No. (3), and No. (3) excludes the group constituted by No. (4), No. (4) and No. (5).

assigned to the maternal side is also to be distributed according to the same principle [sec. 58]. Ch. VII,  
Ss. 65-69

The whole of sec. 65 is based on the above rules.

*Order of priority among descendants.*—The descendants of uncles and aunts may belong to the paternal side or they may belong to the maternal side. The two sides *inherit together*, and no claimant on either side excludes any claimant on the other side. The Table given on the previous page shows at a glance all uncles and aunts of the deceased and their descendants up to the third generation.

**66. Other Distant Kindred of the fourth class.**—If there are no descendants of uncles and aunts, the estate will devolve upon other Distant Kindred of the fourth class in the order of succession given in sec. 63 above, the distribution among higher uncles and aunts being governed by the principles stated in sec. 64, and that among their descendants by those stated in sec. 65 [Sir. 58].

*E.—Successors unrelated in blood.*

**67. Successor by contract.**—In default of Sharers, Residuarys, and Distant Kindred, the inheritance devolves upon the “Successor by contract,” that is, a person who derives his right of succession under a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom to which the deceased may become liable.

Sir. 13; *Hedayat*, 517. The right of inheritance by reason of *Wala* dealt with in this section is taken away by the Slavery Act, 1843.

**68. Acknowledged kinsman.**—Next in succession is the “Acknowledged Kinsman,” that is, a person of unknown descent in whose favour the deceased has made an acknowledgment of kinship, not through himself, but through another.

Such an acknowledgment confers upon the “Acknowledged Kinsman” the right of succession to the property of the deceased, subject to bequests to the extent of the bequeathable third, but it does not invest the person acknowledged with all the rights of an actual kinsman.

Sir. 13. The kinship acknowledged must be kinship *through another*, that is, through the deceased's father or his grandfather. Thus, a person may acknowledge another to be his brother, for that is kinship through the *father* (v) But he may not acknowledge another to be his son, for that is kinship through *himself*. The acknowledgment by the deceased of a person as his son or daughter stands upon a different footing altogether and it is dealt with in the chapter on “Parentage.”

**69. Universal legatee.**—The next successor is the “Universal Legatee,” that is, a person to whom the deceased has left the whole of his property by will.

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(v) Tagore Law Lectures, 1878, pp. 92-93.

**Ss. 69-73** *Sir. 13.* It is to be noted that the prohibition against bequeathing more than one-third of the net assets exists only for the benefit of the heirs. Hence a bequest of the whole will take effect if the deceased has left no known heir (*w*).

**70. Escheat.**—On failure of all the heirs and successors above specified, the property of a deceased Sunni Mahomedan escheats to the Crown.

*Sir. 13.* The rule of pure Mahomedan law in this respect is different, for, according to that rule the property does not devolve upon Government by way of inheritance as *ultimus hæres*, but falls into the *bait-ul-mal* (public treasury) for the benefit of *Mussalmans*.

#### *F.—Miscellaneous.*

**71. Step-children.**—Step-children do not inherit from step-parents, nor do step-parents inherit from step-children.

See *Macnaghten*, p. 99, *Precedents of Inheritance*, No. xxi.

**72. Bastard.**—An illegitimate child is considered to be the child of its mother only, and as such it inherits from its mother and her relations, and they inherit from such child (*x*).

#### *Illustration.*

[A Mahomedan female of the Sunni sect dies leaving a husband and an illegitimate son of her sister. The husband will take 1/2 and the sister's son, though illegitimate, will take the other 1/2 as a distant kinsman, being related to the deceased through his mother: *Bafatun v. Bilasti Khanum* (1903) 30 Cal. 683.]

† An illegitimate child does not inherit from its putative father or his relations, nor do they inherit from such child.

**73. Missing persons.**—When the question is whether a Mahomedan is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is on the person who affirms it.

Under the Hanafi law, a missing person is to be regarded as alive till the lapse of ninety years from the date of his birth. But it has been held by a Full Bench of the Allahabad High Court that this rule is only a rule of evidence, and not one of succession, and it must therefore be taken as superseded by the provisions of the Indian Evidence Act (*y*). The present section reproduces, with some verbal alterations, the provisions of sec. 108 of the Evidence Act.

(w) *Baillie's Mahomedan Law of Inheritance*, p. 19.

(x) *Tagore Law Lectures*, 1873, p. 123.

(y) *Mazhar Ali v. Budh Singh* (1884) 7 All. 297; *Muraj v. Abdul Wahid* (1921) 48 All. 673, 63 I. O. 286.

(21) A. A. 175. See also *Moolla Cassim v. Moolla Abdul* (1905) 33 Cal. 173, 178, 32 I. A. 177; *Arisul Hossain v. Mohammad Faruq* (1934) 9 Luck. 401, 147 I. O. 973, (34) A. O. 41.

## CHAPTER VIII.

### SHIA LAW OF INHERITANCE.

**Work of highest authority: *Sharaya-ul-Islam*.**—The most authoritative text book of the Shia law is *Sharaya-ul-Islam* (a), the whole of which has been translated into French by M. Querry under the title *Droit Musulman*. The Second part of Baillie's Digest of Mahomedan Law, with the exception of the last book, is composed, as the author tells us in the Introduction (p. xxvi), of translations from *Sharaya-ul-Islam*. This Digest is referred to as Baillie, II.

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Ss. 74, 76

**74. Division of heirs.**—The Shias divide heirs into two groups, namely, (1) heirs by consanguinity, that is, blood relations, and (2) heirs by marriage, that is, husband and wife.

**75. Three classes of heirs by consanguinity.**—(1) Heirs by consanguinity are divided into three classes, and each class is sub-divided into two sections. These classes are respectively composed as follows:—

- I. (i) Parents;
- (ii) children and other lineal descendants h.l.s.
- II. (i) Grandparents h.l.s. (true as well as false);
- (ii) brothers and sisters and their descendants h.l.s.
- III. (i) Paternal, and (ii) maternal, uncles and aunts, of the deceased, and of his parents and grandparents h.l.s., and their descendants h.l.s.

(2) Of these three classes of heirs, the first excludes the second from inheritance, and the second excludes the third. But the heirs of the two sections of each class succeed together, the nearer degree in each section excluding the more remote in that section [Baillie, II, 276, 280, 285].

As to the distribution of estate among the heirs, see sec. 83 *et seq.*

#### Illustrations.

[(a) A Shia Mahomedan dies leaving a daughter's son, a father's mother, and a full brother.

(a) *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429, 450; *Baker Ali Khan v. Anjuman Ara Begum* (1902) 50 I.A. 94, 112, 25 All. 286; *Aga Sher Ali v. Bai Kuleum* (1908) 82

Bom. 540, 558; *Ariz Bano v. Muhammad Ibrahim* (1925) 47 All. 823, at pp. 828, 829, 836, 89 I.C. 690, ('25) A.A. 720.

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By Hanafî law the father's mother as a Sharer will take 1/6, and the full brother as a Residuary will take 5/6; the daughter's son, being a Distant Kinsman, will be entirely excluded from inheritance.

By Shia law the daughter's son, being an heir of the first class, will succeed to the whole inheritance in preference to the father's mother and the full brother, both of whom belong to the second class of heirs.

(b) A Shia Mahomedan dies leaving a brother's daughter and a full paternal uncle.

By Hanafî law the full paternal uncle, being a Residuary, will take the whole property to the exclusion of the brother's daughter who is a Distant Kinswoman.

By Shia law the brother's daughter, being an heir of the second class, will succeed in preference to the full paternal uncle who belongs to the third class of heirs.

(c) A Shia Mahomedan dies leaving a full paternal uncle's son and a mother's father.

By Hanafî law the full paternal uncle's son, being a Residuary, will succeed to the whole estate to the entire exclusion of the mother's father who is a Distant Kinsman.

By Shia law the mother's father, being an heir of the second class, will succeed in preference to the full paternal uncle's son who belongs to the third class of heirs.

(d) A Shia Mahomedan dies leaving (1) a father, (2) a mother, (3) a daughter, (4) a son's son, (5) a brother, and (6) a paternal uncle. Which of these relations are entitled to succeed?

Here the first four relations belong to the first class of heirs, the fifth belongs to the second class, and the sixth belongs to the third class. The fifth and sixth are therefore excluded from inheritance. The father and mother belong to the first section of Class 1, and they are both equal in degree. The daughter and son's son belong to the second section, and of these two the daughter, being nearer in degree, excludes the son's son. The only persons therefore entitled to inherit are the father, the mother, and the daughter.

(e) The surviving relations are (1) a grandfather, (2) a grandmother, (3) a great grandfather, (4) a brother, and (5) a brother's son. Here all the relations belong to the second class of heirs, the first three belonging to the first section of that class and the last two to the second section. The grandfather and grandmother exclude the great-grandfather by reason of the rule that the nearer in each section excludes the more remote. For the same reason the brother excludes the brother's son. The only persons therefore entitled to inherit are the grandfather, the grandmother and the brother.]

Note that parents do not exclude children, but inherit with them. If there be no children, parents inherit with grandchildren. Similarly, in the second class, brothers and sisters do not exclude grandparents, but inherit with them. If there be no brothers or sisters, the grandparents inherit with the children of brothers and sisters. In the same way in the third class paternal uncles and aunts do not exclude maternal uncles and aunts, but inherit with them.

The above illustrations exemplify the fundamental distinction between the Sunni and the Shia Law of Inheritance. Under the Sunni law, Distant Kindred are postponed to Sharers and Residuaries (s. 54); under the Shia law, they inherit with them. The Sunnis prefer agnates to cognates: the Shias prefer the nearest kinsman, whether they be agnates or cognates. In fact, the Shia law does not recognize any separate class of heirs corresponding to the "Distant

Kindred " of Sunni law All heirs under the Shia law are either Sharers or Residuaries (s. 77). **Ch. VIII, Ss. 75-78**

**76. Husband and wife.**—The husband or wife is never excluded from succession, but inherits together with the nearest heirs by consanguinity, the husband taking  $\frac{1}{4}$  or  $\frac{1}{2}$ , and the wife taking  $\frac{1}{8}$  or  $\frac{1}{4}$  under the conditions mentioned in the Table of Sharers on page 96 below.

As to the disability of a childless widow to succeed to her husband's immovable property, see sec. 99 below.

**77. Table of Sharers—Shia Law.**—(1) For the purpose of determining the shares of heirs, the Shias divide heirs into two classes, namely, Sharers and Residuaries. There is no separate class of heirs corresponding to the "Distant Kindred" of Sunni law.

(2) The Sharers are nine in number. The Table on page 96 gives a list of Sharers together with the shares assigned to them in Shia law.

(3) The descendants h.s. of Sharers are also Sharers.

Of the nine sharers mentioned in the Table, the first two are heirs by affinity. The next three belong to the first class of heirs by consanguinity [s. 75], and the remaining four belong to the second class. There are no Sharers in the third class of heirs.

Note that the true grandfather h.s., the true grandmother h.s., and the son's daughter h.s., who are Sharers according to Sunni law, are not Sharers, but Residuaries, according to Shia law.

It is very important to note that the descendants of Sharers are also Sharers. This refers, of course, to the descendants of the (1) daughter, (2) uterine brother, (3) uterine sister, (4) full sister, and (5) consanguine sister. It does not refer to the descendants, if they can be called descendants at all, of the husband, wife, father or mother. The Shia jurists are not concerned with the descendants of these four relations.

**78. Residuaries.**—(1) All heirs other than Sharers are Residuaries.

(2) The descendants h.s. of Residuaries are also Residuaries.

Thus sons, brothers, uncles and aunts are all Residuaries. Their descendants, therefore, are also Residuaries. For example, a son's daughter, being a descendant of a Residuary (son), is also a Residuary.

Of the nine Sharers mentioned in the Table of Sharers, there are four who inherit sometimes as Sharers, and sometimes as Residuaries. These are the (1) father, (2) daughter, (3) full sister, and (4) consanguine sister. As to the last three, it is to be observed that where any one of them would have, if living, inherited as a Sharer, her descendants would inherit as Sharers, and if she would have inherited as a Residuary, her descendants would inherit as Residuaries (s. 82).



**Ss. 79, 80**      **79. Distribution of property.**—(1) If the deceased left only one heir, the whole property would devolve upon that heir, except in the case of a wife. If the only heir be a wife, the older view is that she is entitled to no more than her Koranic share (one-fourth) and the residue (three-fourths) escheats to the Crown.

Baillie, II, 262. The reason of the exception in the case of a wife is that she is not entitled to the surplus by *Return*, not even if there be no other heir. If she is the sole heir, she takes  $\frac{1}{4}$ , and the surplus passes to the Imam, now the Crown. Ameer Ali is of opinion that there being no machinery now to take charge of the Imam's share, the surplus should pass to the wife [Ameer Ali, 5th ed., Vol. II, p. 123, f.n. (3)]. This opinion has been followed by the Oudh Court (b).

If the only heir be a sharer, *e.g.*, a husband, he takes his Koranic share (one-half) as a Sharer, and the residue by *Return*. If the only heir be a Residuary, *e.g.*, a brother, he takes the whole estate as a Residuary. As to Sunni law, see sec. 53.

(2) If the deceased left two or more heirs, the first step in the distribution of the estate is to assign his or her share to the husband or wife. The next step is to ascertain which of the surviving relations are entitled to succeed, and this is to be done with the help of the rules laid down in sec. 75. The estate (*minus* the share of the husband or wife, if any) is then to be divided among those entitled to succeed according to the rules of distribution applicable to the class to which they belong (ss. 83-97).

Note that the husband or wife, as the case may be, is always entitled to succeed whatever be the class to which the other claimants belong. The husband and wife always inherit as Sharers, their shares being respectively  $\frac{1}{4}$  and  $\frac{1}{8}$  when there is a lineal descendant, and  $\frac{1}{2}$  and  $\frac{1}{4}$  when there is no lineal descendant. Since there are no lineal descendants either in the second or third class of heirs, it follows that when the husband or wife succeeds with the heirs of the second or third class, he or she takes his or her full share, that is, the husband takes  $\frac{1}{2}$ , and the wife takes  $\frac{1}{4}$ .

**80. Representation.**—(1) The principle of representation has more than one meaning. It may be applied for the purpose of deciding

- (a) what persons are entitled to inherit, or
- (b) the quantum of the share of any given person on the footing that he is entitled to inherit (c).

(2) Where for purpose (a) the rule of exclusion applies (*i.e.*, the nearer in degree excludes the more remote) it is true both of Sunnis and Shias that the principle of repre-

(b) *Abdul Hamid Khan v. Peara Mirza* (1935) 10 Luck. 550, 158 I.O. 379, ('35) A.O. 78.      (c) *Aga Sheralli v. Bai Kuleum* (1908) 32 Bom. 540, 547, 548, 558.

sentation is not recognized as qualifying the rule of exclusion. Thus if *A* dies leaving him surviving a son and grandsons by a predeceased son, the grandsons are excluded from inheritance by their uncle. They do not take in their father's stead though he would have been an heir had he survived his father.

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S. 80

(3) But if both sons predeceased the propositus who died leaving three grandsons by one son and two by the other, then all the grandsons are heirs. In that case, is the principle of representation to be applied for purpose (b), that is for ascertaining the share of each grandson? This is a further and different question. If the principle is applied, the grandsons of one branch will have to divide into three what the grandsons of the other branch divide in half.

In the case supposed, Sunni law would not proceed upon any principle of representation in calculating the grandson's shares (see rule (1) in sec. 58 *supra*). The grandsons would each take the same share, i.e., a share ascertained without recourse to the representation principle. The division among them would be *per capita* and not *per stirpes*. As explained in sec. 58, however, recognition of the principle of representation for the purpose of calculating shares is not altogether absent from the Sunni law. Rules (2) and (3) therein formulated disclose the influence of the principle in ascertaining the share of each heir in cases to which these rules are applicable.

(4) For the limited purpose of calculating the share of each heir—as distinct from the purpose of ascertaining the heirs—the Shia law accepts the principle of representation as a cardinal principle throughout. According to that principle the descendants of a deceased son, if they are heirs, take the portion which he if living would have taken and in that sense represent the son. In the same limited sense, the descendants of a deceased daughter represent the daughter: if they inherit, they take the portion which the daughter if living would have taken. The principle is applicable in the same way to the descendants of a deceased brother, sister or aunt.

(5) The principle of representation is not confined in its operation to descendants only. It applies in the ascending as well as in the descending line. Thus great-grandparents take the portion which the grandparents, if living, would have taken: and the father's uncles and aunts take the portion which the deceased's uncles and aunts if living would have taken.

*When the rule of exclusion applies.*—The rule that the nearer in degree excludes the more remote is a rule applied within the limits of each class of heirs. In Sunni law (see sec. 52 *supra*) it is not without other limitations (see

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## TABLE OF SHARERS—SHIA LAW [Sec. 77.]

(Baillie, II, 271-276, 381.)

Sharers	Normal share		Conditions under which the share is inherited.	Share as varied by special circumstances.
	of one.	of two or more collectively.		
1 Husband .	1/4	.	When there is a lineal descendant.	1/2 when no such descendant.
2 Wife	1/8	1/8	When there is a lineal descendant.	1/4 when no such descendant.
Father (f).	1/6	..	When there is a lineal descendant	[If there be no lineal descendant, the father inherits as a residuary]
Mother .	1/6	..	(a) When there is a lineal descendant; or (b) when there are two or more full or consanguine brothers, or one such brother and two such sisters, or four such sisters, with the father.	1/3 in other cases
5. Daughter .	1/2	2/3	When no son	[With the son she takes as a residuary]
6. } Uterine 7. } brother or sister	1/6	1/3	When no parent, or lineal descendant. [see s. 75]	
8. Full sister.	1/2	2/3	When no parent or lineal descendant, or full brother, for father's father [see ss. 75, 88].	[The full sister takes as a residuary with the full brother and also with the father's father: see s. 88.]
9. Consanguine sister.	1/2	2/3	When no parent, or lineal descendant, or full brother or sister, or consanguine brother or father's father [see ss. 75, 88]	[The consanguine sister takes as a residuary with the consanguine brother and also with the father's father: see s. 88.]

Note.—The descendants h. l. s. of sharers are also sharers [sec. 77.]

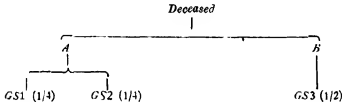
(4) As to the father's extra rights as Sharer, see sects. 95 and 97.

note "Principles of succession among sharers and residuaries" at p. 60 *supra*). But among Shias it applies within each section in all cases without distinction of class or sex. (See sec. 75 (2) *supra* and Baillie II, 270). As the classification of heirs is different in the two systems, the application of the doctrine has different results as regards the persons entitled to inherit. The extent of this divergence is not the subject matter of the present section which is concerned only with the ascertainment of shares under the Shia law, for which purposes the principle of representation is fundamental.

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Ss. 80-82

**81. Stirpital succession.**—Succession among descendants in each of the three classes of heirs (s. 75) is *per stirpes*, and not *per capita* (e).

This is repeating in other words the principle of representation described in the last section. Thus suppose a Shia dies leaving two grandsons *GS1* and *GS2* by a predeceased son *A* and a grandson *GS3* by another predeceased son *B*, as shown in the following diagram:—

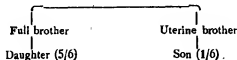


By Shia law the estate is to be notionally divided first among the two sons *A* and *B*, so that each takes 1/2. *A*'s share 1/2 descends to his two sons *GS1* and *GS2*, each taking 1/4. *B*'s share 1/2 passes to his son *GS3*. The division, in other words, is according to the *stocks*, and not according to the *claimants*. By Sunni law *GS1*, *GS2* and *GS3* take *per capita*, that is, each takes 1/3 without reference to the shares which their respective fathers, if living, would have taken. Under the Shia law *A*'s two sons represent *A* and stand in his place, and *B*'s son represents *B* and stands in his place. Under the Sunni law there is no such representation (s. 42).

The above is an example of succession *per stirpes* among the descendants of sons. The descendants of daughters, brothers, sisters, uncles, aunts, grand-uncles and grandaunts also succeed *per stirpes*: see secs. 83, 87, 91 and 92.

**82. Succession among descendants.**—The descendants of a person who, if living, would have taken as a Sharer, succeed as Sharers. The descendants of a person who, if living, would have taken as a Residuary, succeed as Residuaries.

This follows necessarily from the principle of representation described in sec. 80. Thus suppose a Shia dies leaving a full brother's daughter and a uterine brother's son as shown in the following diagram:—



(e) *Aga Sher Ali v. Bai Kulum* (1908) 22 Bom. 840.

**§s. 82, 83** The uterine brother, had he survived, would have taken as a Sharer his Koranic share  $\frac{1}{6}$  [see Table of Sh., No. 6]. The full brother, had he survived, would have taken  $\frac{5}{6}$  as a residuary. The uterine brother's son, being the descendant of a Sharer, will succeed as a sharer, and *representing* as he does his father, take his father's share  $\frac{1}{6}$ . The full brother's daughter, being the descendant of a Residuary, will succeed also as a Residuary, and *representing* as she does her father, takes her father's portion  $\frac{5}{6}$ . Under the Sunni law, both a full brother's daughter and a uterine brother's son are Distant, Kindred of the third class. According to Imam Muhammad, the former would take  $\frac{5}{6}$  and the latter  $\frac{1}{6}$  exactly as in Shia law [see s. 62]. According to Abu Yusuf, the former entirely excludes the latter [see notes to sec. 61, "Doctrine of Abu Yusuf"].

Having described the mode of distribution in sec. 79, and having explained the principle of representation in sec. 80, and its two corollaries in secs. 81 and 82, we proceed to enumerate the special rules by which succession in each of the three classes of heirs mentioned in sec. 75 is governed.

### *Distribution among Heirs of the First Class.*

**83. Rules of succession among heirs of the first class.**—The persons who are first entitled to succeed to the estate of a deceased Shia Mahomedan are the heirs of the first class *along with* the husband or wife, if any [s. 79 (2)]. The first class of heirs comprises parents, children, grandchildren, and remoter lineal descendants of the deceased. The parents inherit together with children, and, failing children, with grandchildren, and, failing grandchildren, with remoter lineal descendants of the deceased, the nearer excluding the more remote [s. 75]. Succession in this class is governed by the following rules:—

(1) *Father*.—The father takes  $\frac{1}{6}$  as a Sharer if there is a lineal descendant; as a Residuary, if there be no lineal descendant [see Tab. of Sh., No. 3].

(2) *Mother*.—The mother is always a Sharer, and her share is  $\frac{1}{6}$  or  $\frac{1}{3}$  [see Tab. of Sh., No. 4].

(3) *Son*.—The son always takes as a Residuary.

(4) *Daughter*.—The daughter inherits as a Sharer, unless there is a son in which case she takes as a Residuary with him according to the rule of the double share to the male [see Tab. of Sh., No. 5].

(5) *Grandchildren*.—On failure of children, the grandchildren stand in the place of their respective parents, and they inherit according to the principle of representation described in secs. 80, 81, and 82, that is to say—

(i) the children of each son take the portion which their father, if living, would have taken as a Residuary,

- and divide it among them according to the rule of **Ch. VIII.**  
 • the double share to the male; **S. 83**

- (ii) the children of each daughter take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary and divide it among them also according to the rule of the double share to the male.

(6) *Remoter lineal descendants*.—Succession among remoter lineal descendants is governed by the same principle of representation, that is to say, great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them according to the rule of the double share to the male, and great-great-grandchildren take the portion which their respective parents, if living, would have taken, and divide it among them also according to the same rule.

Baillie, II, 276-279.

*Mode of distribution among husband or wife and heirs of the first class—*

*first*, assign his or her share to the husband or wife [see Tab. of Sh., Nos. 1-2];

*next*, assign their shares to such of the claimants as can inherit as Sharers only;

*next*, divide the residue, if any, among the residuaries;

*lastly*, if there be no Residuary, and the sum total of the shares is less than unity, apply the Doctrine of Return as stated in secs. 93 to 96; and if the sum total exceeds unity, proceed as stated in sec. 97.

*Illustrations.*

(a) <i>Husband</i>	..	..	..	1/2	(as sharer)
<i>Mother</i>	..	..	..	1/3	(as sharer)
<i>Father</i>	..	..	..	1/6	(as residuary)

*Note*.—Under the Sunni law, the mother takes  $1/3 \times 1/2 = 1/6$ , and the father  $1/2$  as a residuary [see Tab. of Sh., Sunni law, No. 5].

(b) <i>Wife</i>	..	..	..	1/4	(as sharer)
<i>Mother</i>	..	..	..	1/3	(as sharer)
<i>Father</i>	..	..	..	5/12	(as residuary)

*Note*.—Under the Sunni law, the mother takes  $1/3 \times 3/4 = 1/4$ , and the father  $1/2$  as a residuary [see Tab. of Sh., Sunni law, No. 5].

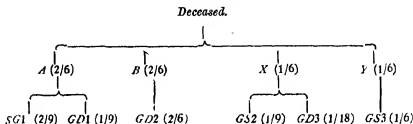
(c) <i>Father</i>	..	..	..	1/6	(as sharer)
<i>Mother</i>	..	..	..	1/6	(as sharer)
<i>Son</i>	..	..	..	2/3	(as residuary)

*Note*.—If instead of a son, there was a son's daughter, she would have taken  $2/3$  as representing her father.

(d) <i>Father</i>	..	..	..	1/6	(as sharer, because there are daughters)
<i>Mother</i>	..	..	..	1/6	(as sharer)
<i>2 daughters</i>	..	..	..	2/3	(as sharers)

**Ss. 83, 84** Note.—The shares would be the same if we substitute daughters' sons or daughters' daughters for daughters.

(e) A Shia dies leaving a grandson *GS1* and a granddaughter *GD1* by a predeceased son *A*, a granddaughter *GD2* by another predeceased son *B*, a grandson *GS2* and a granddaughter *GD3* by a predeceased daughter *X*, and a grandson *GS3* by another predeceased daughter *Y*, as shown in the following diagram:—



Here the two daughters *X* and *Y*, if living, would have taken as residuaries with the two sons *A* and *B* according to the rule of the double share to the male, so that *A* and *B* would each have taken  $2/6$ , and *X* and *Y* would each have taken  $1/6$ .

*A*'s share  $2/6$  will pass to his son and daughter according to the rule of the double share to the male, so that *GS1* will take  $2/3 \times 2/6 = 2/9$ , and *GD1* will take  $1/3 \times 2/6 = 1/9$ .

*B*'s share  $2/6$  will pass to his daughter *GD2*.

*X*'s share  $1/6$  will be divided between her son and her daughter according to the rule of the double share to the male, so that *GS2* will take  $2/3 \times 1/6 = 1/9$ , and *GD3* will take  $1/3 \times 1/6 = 1/18$ .

*Y*'s share  $1/6$  will pass to her son *GS3*.

The shares will thus be  $2/9 + 1/9 + 2/6 + 1/9 + 1/18 + 1/6 = 1$ .

According to the Hanafi law *GS1*, *GD1* and *GD2* are Residuaries, and they exclude *GS2*, *GD3*, and *GS3* who are Distant Kindred. *GS1* will take  $1/2$ , and *GD1* and *GD2* will each take  $1/4$ .

If in the case put above, the deceased left also a wife, the wife will first take her share  $1/8$ , and the remaining  $7/8$  will be divided among the six grandchildren in the same proportions.

#### *Distribution among Heirs of the Second Class.*

##### **84. Rules of succession among heirs of the second class.—**

If there are no heirs of the first class, the estate (*minus* the share of the husband or wife, if any) devolves upon the heirs of the second class. The second class of heirs comprises grandparents h.h.s. and brothers and sisters and their descendants h.l.s. [s. 75]. The rules of succession among the heirs of this class are different according as the surviving relations are—

- (1) grandparents h.h.s., *without* brothers or sisters or their descendants;
- (2) brothers and sisters or their descendants, *without* grandparents or remoter ancestors;

- (3) grandparents h.h.s., *with* brothers and sisters or their descendants. Ch. VIII,  
Ss. 84 86

The first case is dealt with in sec. 85. The second case is dealt with in secs. 86 and 87. The third case is dealt with in sec. 88.

**85. Grandparents h.h.s., without brothers or sisters or their descendants.**—If there are no brothers or sisters, or descendants of brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents according to the following rules:—

(1) If the deceased left all his four grandparents surviving, the paternal grandparents take two-thirds, and divide it between them according to the rule of the double share to the male, and the maternal grandparents take 1/3, and divide it equally between them, as shown below:—

$\frac{2}{3}$	{	Father's father	.	$\frac{2}{3} \times \frac{2}{3} = \frac{4}{9} = \frac{8}{18}$
		Father's mother	..	$\frac{1}{3} \times \frac{2}{3} = \frac{2}{9} = \frac{4}{18}$
$\frac{1}{3}$	{	Mother's father	.	$\frac{1}{2} \times \frac{1}{3} = \frac{1}{6} = \frac{3}{18}$
		Mother's mother	.	$\frac{1}{2} \times \frac{1}{3} = \frac{1}{6} = \frac{3}{18}$

(2) If there is only one grandparent on the paternal side, he or she takes the entire 2/3. Similarly, if there is only one grandparent on the maternal side, he or she takes the entire 1/3, as shown below:—

(a)	Father's father	..	..	$\frac{2}{3}$
	Mother's father	.	..	$\frac{1}{3}$ (each taking 1/6)
	Mother's mother	..	..	
(b)	Father's father	{	$\frac{2}{3}$ ..	$\frac{2}{3} \times \frac{2}{3} = \frac{4}{9}$
	Father's mother			
	Mother's mother		$\frac{1}{3}$ ..	$\frac{1}{3} \times \frac{2}{3} = \frac{2}{9}$ $= \frac{3}{9}$
(c)	Father's father	.	..	$\frac{2}{3}$
	Mother's mother	.	..	$\frac{1}{3}$

(3) If there are no grandparents, the property will devolve according to the same rules upon remoter ancestors of the deceased, the nearer excluding the more remote.

Baillie, II, 281, 283.

**86. Brothers and sisters, without any ancestor.**—If the deceased left no ancestors, but brothers and sisters of various kinds, the estate (*minus* the share of the husband or wife, if any) will be distributed among them according to the same rules as those in Hanafi law. The said rules are as follows:—

(i) Brothers and sisters of the full blood exclude consanguine brothers and sisters.



**Ss. 86, 87** (ii) Uterine brothers and sisters are not excluded by brothers or sisters either full or consanguine, but they inherit with them, their share being  $\frac{1}{3}$  or  $\frac{1}{6}$  according to their number [see Tab. of Sh., Nos. 6 and 7]. ♦

(iii) Full brothers take as Residuaries, so do consanguine brothers.

(iv) Full sisters take as Sharers [see Tab. of Sh., No. 8], unless there be a full brother in which case they take as Residuaries with him according to the rule of the double share to the male. Consanguine sisters also take as Sharers [see Tab. of Sh., No. 9] unless there be a consanguine brother with them in which case they take as Residuaries with him according to the same rule.

Baillie, II, 280.

#### Illustrations.

*Note.*—The shares of the several heirs in the following illustrations are the same both in Sunni and Shia law. The illustrations are given to familiarize the student with combinations of heirs that are common in Shia law:—

(a) <i>Husband</i> .. .. .	$\frac{1}{2}$	(as sharer)
Full (or cons.) sister .. .. .	$\frac{1}{2}$	(as sharer)
(b) <i>Wife</i> .. .. .	$\frac{1}{4}$	(as sharer)
Full brother .. .. .	$\frac{3}{4}$	(as residuary)
(c) <i>Husband</i> .. .. .	$\frac{1}{2}$	(as sharer)
Full brother .. .. .	$\frac{2}{3} \times (\frac{1}{2}) = \frac{1}{3}$	} (as residuaries)
Full sister .. .. .	$\frac{1}{3} \times (\frac{1}{2}) = \frac{1}{6}$	
(d) <i>Wife</i> .. .. .	$\frac{1}{4}$	(as sharer)
Ut. brother .. .. .	$\frac{1}{6}$	(as sharer)
Cons. brother .. .. .	$\frac{2}{3} \times (\frac{7}{12}) = \frac{7}{18}$	} (as residuaries)
Cons. sister .. .. .	$\frac{1}{3} \times (\frac{7}{12}) = \frac{7}{36}$	

**87. Descendants of brothers and sisters, without any ancestor.**—If there are no brothers or sisters of any kind, and no ancestors, but there are children of brothers and of sisters, the estate (*minus* the share of the husband or wife, if any) will devolve upon them according to the principle of representation described in secs. 80, 81 and 82, that is to say—

- (1) The children of each full or consanguine brother will take the portion which their father, if living, would have taken as a Residuary, and they will divide it among them according to the rule of the double share to the male; and the children of each full or consanguine sister will take the portion which their mother, if living, would have taken either as a Sharer or as a Residuary, and they will divide it among them according also to the rule of the double share to the male.
- (2) The children of each uterine brother will take the portion which their father, if living, would have taken as a Sharer, and they will divide it *equally*

among them; and so will the children of each uterine sister. Ch. VIII,  
S. 87

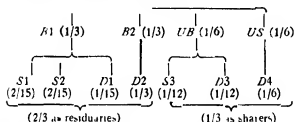
- (3) If there are no children of brothers or sisters, the estate will devolve upon the grandchildren of brothers and sisters according to the principle of representation, that is to say, the grandchildren of full or consanguine brothers and sisters take the portion which their *respective* parents, if living, would have taken and divide it among them according to the rule of the double share to the male, and the grandchildren of uterine brothers and sisters take the portion which their *respective* parents, if living, would have taken, and divide it equally among them without distinction of sex.

Baillie, II, 284.

*Illustrations.*

- (a) *Husband* .. .. .  $1/2$  (as sharer)  
*Ut. brother's daughter* ..  $1/6$  (as sharer, being her father's portion)  
*Full brother's daughter* ..  $1/3$  (as residuary, being her father's portion)  
*Cons. brother's son* .. 0 (excluded by full brother's daughter)

- (b) Suppose the claimants to be as shown in the second line of the following diagram, that is to say,—  
 two sons and a daughter of a full brother, *B1*;  
 a daughter of another full brother, *B2*;  
 a son and a daughter of a uterine brother, *UB*;  
 a daughter of a uterine sister, *US*;



First, assign their respective shares to the brothers and sisters thus:—

*UB* and *US* .. .. .  $1/3$  (as sharers), each taking  $1/6$ ;  
*B1* and *B2* .. .. .  $2/3$  (as residuaries), each taking  $1/3$ .

Next assign portions to their children thus:—

*US*'s share  $1/6$  will go to her daughter *D4*;  
*UB*'s share  $1/6$  will be divided *equally* between *S3* and *D3*, each taking  $1/12$ ;  
*B2*'s share  $1/3$  will go to his daughter *D2*;  
*B1*'s share  $1/3$  will be divided among his two sons and his daughter according to the rule of the double share to the male, so that *S1* will take  $2/5 \times 1/3 = 2/15$ , *S2* will also take  $2/15$ , and *D1* will take  $1/5 \times 1/3 = 1/15$ .

The shares will thus be  $2/15 + 2/15 + 1/15 + 1/3 + 1/12 + 1/12 + 1/6 = 1$ .

Suppose that in the case put above the children of the brothers and sisters had all predeceased the propositus, and that *S1* has left a son and a daughter,

**Ss. 87, 88** that S3 also had left a son and a daughter, and the remaining five nephews and nieces had each left a son. In that case the share of S1, that is,  $\frac{2}{15}$ , would be divided between his son and his daughter according to the rule of the double share to the male, the son taking  $\frac{2}{3} \times \frac{2}{15} = \frac{4}{45}$ , and the daughter  $\frac{1}{3} \times \frac{2}{15} = \frac{2}{45}$ . The share of S3, that is,  $\frac{1}{12}$ , would be divided *equally* between his son and daughter, they being descendants of a uterine brother, so that each would take  $\frac{1}{24}$ . The sons of S2, D1, D2, D3, and D4, would take their respective parents' portion.

**88. Grandparents and remoter ancestors with brothers and sisters or their descendants.**—(1) If the deceased left grandparents, and also brothers or sisters, the estate (*minus* the share of the husband or wife, if any) is to be distributed among grandparents *and* brothers and sisters, according to the following rules:—

- (a) A paternal grandfather counts as a full or consanguine brother, and a paternal grandmother counts as a full or consanguine sister.
- (b) A maternal grandfather counts as a uterine brother, and a maternal grandmother counts as a uterine sister.

(2) On failure of grandparents, the remoter ancestors of the deceased stand in the place of the grandparents through whom they are respectively connected with the deceased. On failure of brothers or sisters, their descendants stand in the place of their respective parents.

Baillie, II, 281, 391-392; Wilson, Anglo-Muhammadian Law, sec. 468.

The effect of the above rules is that when among heirs of the second class you find a single brother or sister, full, consanguine or uterine, what you have to do is to substitute for grandparents so many brothers and sisters according to the above rules, and then assign shares to grandparents as if they were so many brothers and sisters, as is done in the following illustrations:—

- (a) *Paternal grandfather* (=full brother) ..  $\frac{2}{3}$   
*Full sister* .. .. .  $\frac{1}{3}$

*Note.*—Here the full sister takes as a residuary with the paternal grandfather, the latter being counted as a full brother.

- (b) *Paternal grandfather* (=consanguine brother) ..  $\frac{2}{3}$   
*Consanguine sister* .. .. .  $\frac{1}{3}$

*Note.*—Here the consanguine sister takes as a residuary with the paternal grandfather, the latter being counted as a consanguine brother.

- (c) *Uterine brother* .. .. . }  $\frac{1}{3}$  (each taking  $\frac{1}{6}$ )  
*Maternal grandmother* (=ut. sister) .. .. . }  
*2 full sisters* .. .. .  $\frac{2}{3}$  (as sharers).

*Note.*—Here the maternal grandmother counts as a uterine sister, so that the case is the same as if we had a uterine brother and a uterine sister; these take  $\frac{1}{3}$  between them as sharers.

(d) Full brother	.. .. .	$\frac{4}{18}$	} $\frac{2}{3}$ as residuaries.
Full sister	.. .. .	$\frac{2}{18}$	
Father's father (=full brother)	.. .. .	$\frac{4}{18}$	
Father's mother (=full sister)	.. .. .	$\frac{2}{18}$	
Mother's father (=ut. sister)	.. .. .	$\frac{1}{6}$	} $\frac{1}{3}$ as sharers.
Mother's mother (=ut. sister)	.. .. .	$\frac{1}{6}$	

Ch. VIII,  
Ss. 88, 89

*Note.*—First substitute brothers and sisters for grandparents, so that we have 2 full brothers, 2 full sisters, one uterine brother and one uterine-sister. The uterine brother and sister take  $\frac{1}{3}$  between them as sharers. The residue  $\frac{2}{3}$  is to be divided between full brothers and 2 full sisters as residuaries according to the rule of the double share to the male. Each brother therefore takes  $\frac{2}{6} \times \frac{2}{3} = \frac{4}{18}$ , and each sister  $\frac{1}{6} \times \frac{2}{3} = \frac{2}{18}$ . The result would be the same if instead of a full brother and a full sister in the above case, there were a consanguine brother and a consanguine sister.

(e) Uterine brother	.. .. .	$\frac{1}{9}$	} $\frac{1}{3}$ as sharers.
Uterine sister	.. .. .	$\frac{1}{9}$	
Mother's mother (=uterine sister)	.. .. .	$\frac{1}{9}$	
Father's father (=con. brother)	.. .. .	$\frac{1}{3}$	} $\frac{2}{3}$ as residuaries.
Father's mother (=con. sister)	.. .. .	$\frac{1}{6}$	
Con. sister	.. .. .	$\frac{1}{6}$	

*Note.*—Substitute "uterine sister" for "mother's mother", so that we have one uterine brother and two uterine sisters. Next as there is a consanguine sister, substitute "consanguine brother" for "father's father" and "consanguine sister" for "father's mother." The uterine brother and the two uterine sisters take collectively  $\frac{1}{3}$  as sharers. The residue  $\frac{2}{3}$  is to be divided between one consanguine brother and two consanguine sisters as residuaries according to the rule of the double share to the male. The brother therefore takes  $\frac{2}{4} \times \frac{2}{3} = \frac{1}{3}$ , and each sister takes  $\frac{1}{4} \times \frac{2}{3} = \frac{1}{6}$ .

(f) Husband	.. .. .	$\frac{1}{2}$	} $\frac{1}{2}$ as residuaries, each taking $\frac{1}{4}$ .
Father's father (=full brother)	.. .. .	$\frac{1}{2}$	
Full brother	.. .. .	$\frac{1}{4}$	
(g) Wife	.. .. .	$\frac{1}{4}$	} $\frac{1}{3}$ as sharers, each taking $\frac{1}{9}$
Uterine sister	.. .. .	$\frac{1}{9}$	
Uterine brother	.. .. .	$\frac{1}{9}$	
Maternal grandfather (=ut. brother)	.. .. .	$\frac{1}{9}$	
Paternal grandfather	.. .. .	$\frac{5}{12}$ (as residuary)	

*Note.*—In the above case, it is all the same whether you count the paternal grandfather as a full brother or as a consanguine brother; in either case he takes as a residuary.

(h) Full brother's son	.. .. .	$\frac{1}{2}$ (being his father's share)
Father's father (=full brother)	.. .. .	$\frac{1}{2}$

*Note.*—The above illustration is taken from Baillie, II, pp. 327 328, 392.

### *Distribution among Heirs of the Third Class.*

#### 89. Order of succession among heirs of the third class.—

(1) If there are no heirs of the first or second class, the estate

**Ss. 89, 90** (*minus* the share of the husband or wife, if any) devolves upon the heirs of the third class in the order given below:—

- (1) Paternal and maternal uncles and aunts of the deceased.
- (2) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (3) Paternal and maternal uncles and aunts of the parents.
- (4) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (5) Paternal and maternal uncles and aunts of the grandparents.
- (6) Their descendants h.l.s., the nearer in degree excluding the more remote.
- (7) Remoter uncles and aunts and their descendants in like order.

(2) Of the above groups each in turn must be exhausted before any member of the next group can succeed.

*Exception.*—If the only claimants be the son of a full paternal uncle and a consanguine paternal uncle, the former, though he belongs to group (2), excludes the latter who is nearer and belongs to group (1).

Ballie, II, 285-286, 329-332.

*Exception to sub-sec. (2).*—The Shias are the followers of Ali. Ali was a cousin of the Prophet. He was also the son-in-law of the Prophet, having been married to his favourite daughter Fatima. The Shias maintain that on the death of the Prophet the Caliphate (successorship to the Prophet) ought to have gone first to Ali, on the ground that he was the *nearest male heir* of the Prophet. But the Prophet had also left a consanguine paternal uncle (named Abbas), and Ali was but a cousin of the Prophet, being the son of a full paternal uncle (Abu Talib) of the Prophet. Ali therefore could not be the *nearest male heir*, unless the son of a full paternal uncle was entitled to succeed in preference to a consanguine uncle. To uphold, however, the claim of Ali and that of the lineal descendants of the Prophet through Fatima, the Shias had to hold that the son of a full paternal uncle was entitled to succeed in preference to a consanguine paternal uncle, and this accounts for the exception to sub-sec. (2) above.

*No sharers in the third class of heirs.*—The heirs of the third class are all Residuaries. There is no sharer among them as will be seen on referring to the Table of Sharers given above.

**90. Uncles and aunts.**—To distribute the estate among uncles and aunts proceed as follows:—

- (1) *First*, assign  $\frac{2}{3}$  of the estate to the paternal side, that is, to paternal uncles and aunts, even if there

be only one such, and  $1/3$  to the maternal side, that is, to maternal uncles and aunts, even if there be only one such. Ch. VIII,  
S. 90

- (2) *Next*, divide the portion assigned to the paternal side (that is  $2/3$  of the estate) among the paternal uncles and aunts exactly as if they were brothers and sisters of the deceased, that is to say:—
- (i) assign to uterine paternal uncles and aunts—
    - (a) if there be two or more of them,  $1/3$  to be equally divided among them;
    - (b) if there be only one of them,  $1/6$ ;
  - (ii) divide the remainder among full paternal uncles and aunts according to the rule of the double share to the male, and, *failing them*, among consanguine paternal uncles and aunts according to the same rule.
- (3) *Lastly*, divide the portion assigned to the maternal side, among the maternal uncles and aunts as follows:—
- (i) assign to uterine maternal uncles and aunts—
    - (a) if there be two or more of them,  $1/3$  to be equally divided among them;
    - (b) if there be only one of them,  $1/6$ ;
  - (ii) divide the remainder *equally* among full maternal uncles and aunts, and, *failing them*, among consanguine maternal uncles and aunts.
- (4) If there be no uncle or aunt on the maternal side, the paternal side takes the whole. Similarly, if there be no uncle or aunt on the paternal side, the maternal side takes the whole.

Baillie, II, 285, 286, 329.

*Note.*—In working out examples, proceed in the order given in this section.

- (a)  $2/3$  { *Full pat. uncle*  $5/6 \times 2/3 = 5/9$   
           *Cons. pat. uncle*  $= 0$  (excluded by full pat. uncle)  
           *Ut. pat. uncle*  $1/6 \times 2/3 = 1/9$
- $1/3$  { *Full mat. uncle*  $5/6 \times 1/3 = 5/18$   
           *Cons. mat. uncle*  $= 0$  (excluded by full mat. uncle)  
           *Ut. mat. uncle*  $1/6 \times 1/3 = 1/18$
- (b)  $2/3$  { *Full pat. aunt*  $2/3$   
           *Cons. pat. aunt*  $0$  (excluded by full pat. aunt)  
           *Ut. pat. aunt*  $1/3$

- Ss. 90, 91
- (c) Full pat. uncle .  $2/3$  (takes a double share, being a male)  
 Full pat. aunt .  $1/3$
- (d) Full mat. uncle ..  $5/6$   
 Ut. mat. uncle  $1/6$  (being only one)
- (e)  $2/3$  { Cons. pat. uncle  $5/6 \times 2/3 = 5/9$   
 Ut. pat. uncle ..  $1/6 \times 2/3 = 1/9$   
 $1/3$  Ut. mat. aunt  $= 1/3$
- (f) { Full pat. uncle .. }  $2/3 \times 2/3 = 4/9$  .. {  $2/3 \times 4/9 = 8/27$   
 Full pat. aunt .. }  $1/3 \times 4/9 = 4/27$   
 $2/3$  { 4 Ut. pat. uncles .. }  $1/3 \times 2/3 = 2/9$ , .. {  $1/6 \times 2/9 = 1/27$   
 2 Ut. pat. aunts .. each taking  
 $1/3$  { 1 Ut. mat. uncle .. ..  $1/2 \times 1/3 = 1/6$   
 1 Ut. mat. aunt .. ..  $1/2 \times 1/3 = 1/6$   
 $8/27 + 4/27 + 2/9 + 1/6 + 1/6 = 1$
- (g) Full mat. uncle ..  $1/2$   
 Full mat. aunt  $1/2$

Note.—Maternal uncles and aunts take equally without distinction of sex.

- (h) Ut. mat. uncle .. {  $1/3$ , each taking  $1/6$   
 Ut. mat. aunt .. }  
 Full mat. uncle .. {  $2/3$ , each taking  $1/3$   
 Full mat. aunt .. }

Note.—The above result is in accordance with rule (3) above, namely, that full maternal uncles and aunts take equally without distinction of sex. This proposition, however, is not free from doubt. There is another possible view, namely, that full maternal uncles and aunts take equally only if there are no uterine maternal uncles and aunts [as in ill. (g)], and that if there be any such uncles or aunts (as in the above illustration), they take according to the rule of the double share to the male. According to this view, the full maternal uncle in the above illustration is entitled to  $2/3 \times 2/3 = 4/9$ , and the full maternal aunts to  $1/3 \times 2/3 = 2/9$ . The same remarks apply to consanguine maternal uncles and aunts. See Bailhe, II, pp. 285–286, and Querry's Translation of the *Sharya-ul-Islam*, ss. 214-219; Ameer Ali, 5th ed., Vol. II, pp. 119-120

91. Descendants of uncles and aunts.—If there are no uncles or aunts of any kind, children of deceased uncles and aunts take the portion of their respective parents according to the principle of representation described in secs. 80, 81 and 82, the children of each full or consanguine paternal uncle or aunt dividing their parents' share among them according to the rule of the double share to the male, and the children of each of the remaining uncles and aunts, that is, of uterine paternal uncles and aunts, and of maternal uncles and aunts, whether full, consanguine or uterine, dividing their parents' share equally among them.

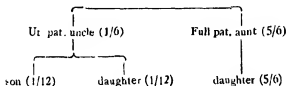
If there are no children of uncles or aunts, the grandchildren of uncles and aunts take the portion of their respective parents according to the same principle.

Baillie, II, 287.

Ch. VIII,  
Ss. 91, 92

*Note.*—In working out examples, first ascertain the hypothetical shares of uncles and aunts.

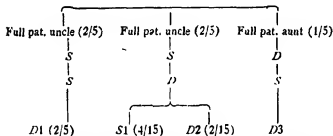
- (a) The surviving relations are—  
a son and a daughter of a uterine paternal uncle, and  
a daughter of a full paternal aunt, as shown in the following diagram:—



The uterine uncle takes  $1/6$ . The aunt of the full blood takes the residue  $5/6$ . The uterine uncle's share  $1/6$  is to be divided *equally* between his son and daughter. The aunt's share  $5/6$  goes to her daughter.

- (b) *Paternal uncle's son* . . .  $2/3$  (the portion of the *paternal side*)  
*Maternal aunt's son* . . .  $1/3$  (the portion of the *maternal side*).

- (c) The surviving relations are (f)—  
a great-granddaughter of a full paternal uncle, D1;  
a great-grandson and a great-granddaughter of another such uncle, S1 and D2;  
a great-granddaughter of a full paternal aunt, D3;



The two uncles take each twice as much as the aunt, so that each uncle takes  $2/5$  and the aunt takes  $1/5$ . The first uncle's share  $2/5$  goes to his descendant D1.

The second uncle's share  $2/5$  is to be divided between his two descendants S1 and D2 according to the rule of the double share to the male, so that S1 takes  $2/3 \times 2/5 = 4/15$ , and D2 takes  $1/3 \times 2/5 = 2/15$ .

The aunt's share  $1/5$  passes to her descendant D3.

According to Hanafi law, the shares will be as stated in ill. (b) to sec. 65 above.

**92. Other heirs of the third class.**—If there are no descendants of uncles or aunts, the estate will devolve upon the other heirs of the third class in the order of succession given in sec. 89, the distribution among higher uncles and aunts being governed by the principles stated in sec. 90, and

(f) *Aga Sheralli v. Bai Kuleum* (1908) 32 Bom. 450.



**Ss. 92-94** that among their descendants being governed by the principles stated in sec. 91.

Baillie, II, 287, 331, 332.

*The "Return" and the "Increase."*

**93. Doctrine of "Return."**—If there is a residue left after satisfying the claims of Sharers, but there are no Residuaries *in the class to which the Sharers belong*, the residue reverts, subject to the three exceptions noted in secs. 94, 95 and 96, to the Sharers in the proportion of their respective shares.

Baillie, II, 262.

*Note.*—In working out examples, follow the rules given in the notes appended to ill. (f) and ill. (l) to sec. 53.

(a) Mother .. ..	1/6 increased to 1/4
Daughter . . . .	1/2=3/6 " 3/4
Brother .. ..	0 (excluded, as being an heir of the second class).

*Note.*—By Hanafi law, the brother would have taken the residue 1/3.

(b) Mother . . . .	1/6 increased to 1/5
Father .. . .	1/6 " 1/5
Daughter .. . .	1/2=3/6 " 3/5

*Note.*—By Hanafi law, the father would have taken the residue 1/6 as a Residuary.

(c) Ut. sister .. . .	1/6 increased to 1/4
Con. sister .. . .	1/2=3/6 " 3/4

*Note.*—Baillie, II, 335-336. If there was a full sister instead of a consanguine sister, the uterine sister would have been excluded from participating in the *Return*. See sec. 96 below.

**94. Husband and wife and "Return."**—Neither the husband nor the wife is entitled to the *Return* if there is any other heir. If the deceased left a husband but no other heir, the surplus will pass to the husband by *Return*. If the deceased left a wife, but no other heir, the older view was that the wife will take her share 1/4, and the surplus will escheat to the Crown; in other words, that the surplus never reverts to a wife. But in *Abdul Hamid Khan v. Peare Mirza (g)* the Oudh Court followed the opinion of Mr. Ameer Ali (Mahomedan Law, Vol. II, 5th Ed., at p. 1254) and held that the rule now in force is that the widow is entitled to take by return.

Baillie, II, p. 262. See sec. 79 and the notes thereto.

(a) <i>Wife</i> .. ..	1/8	= 5/40,	<b>Ch. VIII, Ss. 94-96</b>
<i>Father</i> .. ..	1/6 increased to $1/5 \times (7/8)$	= 7/40	
<i>Mother</i> .. ..	1/6 " $1/5 \times (7/8)$	= 7/40	
<i>Daughter</i> .. ..	$1/2 = 3/6$ " $3/5 \times (7/8)$	= 21/40	

*Note.*—By Hanafi law, the residue  $1/24$  would go to the father as a Residuary.

(b) <i>Husband</i> .. ..	1/4	= 4/16
<i>Father</i> .. ..	1/6 increased to $1/4 \times (3/4)$	= 3/16
<i>Daughter</i> .. ..	$1/2 = (3/6)$ " $3/4 \times (3/4)$	= 9/16

*Note.*—By Hanafi law, the residue  $1/12$  would go to the father as a Residuary.

**95. Mother when excluded from "Return".**—If the deceased left a mother, a father, and one daughter, and also—

- (a) two or more full or consanguine brothers, *or*
- (b) one such brother and two such sisters, *or*
- (c) four such sisters,

the brothers and sisters, though themselves excluded from inheritance as being heirs of the second class, prevent the mother from participating in the *Return*, and the surplus reverts to the father and the daughter in the proportion of their respective shares. This is the only case in which the mother is excluded from the *Return*.

Baillie, II, 272, 317-318, 365, 386.

<i>Mother</i> .. ..	1/6	= 4/24
<i>Father</i> .. ..	1/6 increased to $1/4 \times (5/6)$	= 5/24
<i>Daughter</i> .. ..	$1/2 = 3/6$ " $3/4 \times (5/6)$	= 15/24
2 full brothers .. ..	0 (excluded).	

**96. Uterine brothers and sisters when excluded from "Return".**—If there are uterine brothers or sisters, and also full sisters, the uterine brothers and sisters are not entitled to participate in the *Return*, and the residue goes entirely to the full sisters. This rule does not apply to consanguine sisters. Consanguine sisters and uterine brothers and sisters divide the *Return* in proportion to their shares.

Baillie, II, 335-336.

(a) <i>Uterine brother</i> .. ..		= 1/6
<i>Full sister</i> .. ..	$1/2$ (as sharer) + $1/3$ (by Return)	= 5/6
(b) <i>Uterine brother</i> .. ..	} $1/3$ , each taking $1/6$	
<i>Uterine sister</i> .. ..		
<i>Full sister</i> .. ..	$1/2$ (as sharer) + $1/6$ (by Return)	= 2/3
(c) <i>Wife</i> .. ..	$1/4 = 3/12$	
<i>Uterine sister</i> .. ..	$1/6 = 2/12$	
<i>Full sister</i> .. ..	$1/2$ (as sharer) + $1/12$ (by Return)	= 7/12

**Ss. 96, 97** *Note*.—The wife in case (c) is not entitled to the "Return" as there are other heirs of the deceased (s. 94). The uterine sister is excluded from the "Return" by the full sister, and the latter takes the whole "Return."

*Consanguine sister*.—There is a conflict of opinion whether a consanguine sister is entitled to the whole "Return" in the absence of a full sister. The author of the *Sharaya-ul-Islam* is of opinion that she is not. The author of the *Kaṭī* is of opinion that she is. See sec. 93, ill. (c).

**97. Doctrine of "Increase".**—The Sunni doctrine of *Increase* is not recognized in the Shia law. According to the Shia law, if the sum total of the shares exceeds unity, the fraction in excess of the unity is deducted invariably from the share of—

- (a) the daughter or daughters; or
- (b) full or consanguine sister or sisters.

Baillie, II, 263, 396.

(a) Husband .. ..	$1/4 = 3/12$	$= 3/12$
Daughter .. ..	$1/2 = 6/12$ reduced to $(6/12 - 1/12)$	$= 5/12$
Father .. ..	$1/6 = 2/12$	$= 2/12$
Mother .. ..	$1/6 = 2/12$	$= 2/12$
	<hr/>	
	13/12	1

*Note*.—Here the excess over unity is  $1/12$ , and this is to be deducted from the daughter's share.

(b) Husband .. ..	$1/4 = 3/12$	$= 3/12$
2 daughters .. ..	$2/3 = 8/12$ reduced to $(8/12 - 3/12)$	$= 5/12$ (each $5/24$ ).
Father .. ..	$1/6 = 2/12$	$= 2/12$
Mother .. ..	$1/6 = 2/12$	$= 2/12$
	<hr/>	
	15/12	1

(c) Husband .. ..	$1/2 = 3/6$	$= 3/6 = 1/2$
2 full (or cons.) sisters	$2/3 = 4/6$ reduced to $(4/6 - 1/6)$	$= 3/6 = 1/2$ (each $1/4$ )
	<hr/>	
	7/6	

(d) Husband .. ..	$1/2$
Uterine sister or brother.	$1/6$
Full (or cons.) sister.	$1/2$ reduced to $(1/2 - 1/6) = 1/3$
	<hr/>
	7/6

*Reason of the rule*.—The reason of the rule laid down in this section is stated to be that since a full sister, when co-existing with uterines, gets the full benefit of the "Return" (s. 93), it is but fair that when the sum total of the shares exceeds unity, she should bear the deficit. But what then of the *consanguine* sister? According to the *Sharaya-ul-Islam*, a *consanguine* sister is not entitled to the whole "Return" when she co exists with uterines. Why then should she bear the deficit?

**97A. Escheat.**—On failure of all natural heirs, the estate of a deceased Shia Mahomedan escheats to the Crown (h). Ch. VIII,  
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Baillie, II, 301, 362-363. See sec. 79.

#### *Miscellaneous.*

**98. Eldest son.**—The eldest son, if of sound mind, is exclusively entitled to the wearing apparel of the father, and to his Koran, sword and ring, provided the deceased has left property besides those articles.

Baillie, II, 279.

**99. Childless widow.**—A childless widow takes no share in her husband's lands, but she is entitled to her one-fourth share in the value of trees and buildings standing thereon, as well as in his movable property including debts due to him though they may be secured by a usufructuary mortgage or otherwise.

Baillie, II, 295; *Mir Ali v. Sajuda Begum* (i); *Umaradas Ali Khan v. Welayat Ali Khan* (j); *Muzaffar Ali v. Parbati* (k); *Aga Mahomed Jaffer v. Koolson Beebee* (l); *Durga Das v. Nawab Ali Khan* (m); *Syed Ali v. Syed Muhammad* (n).

The expression "lands" in this section is not confined to agricultural land only, it includes lands forming the site of buildings (o). But a childless widow in the absence of other heirs, was held entitled to inherit in addition to her one-fourth all the remainder of her husband's property, including a house by virtue of the doctrine of "return" (p).

**100. Illegitimate child.**—An illegitimate child does not inherit at all, not even from his mother or her relations, nor do they inherit from him.

Baillie, II, 305; *Sahebzadee Begum v. Hummat Bahadur* (q).

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| <p>(h) <i>Mussammatt Khursaidi v. Secretary of State</i> (1928) 5 Pat. 539, 94 I.O. 483, ('28) A.P. 321.<br/>         (i) (1897) 21 Mad. 27.<br/>         (j) (1896) 19 All. 169.<br/>         (k) (1907) 29 All. 640.<br/>         (l) (1897) 25 Cal. 9 P.O.<br/>         (m) (1926) 48 All. 557, 95 I.O. 19, ('26) A.A. 522.</p> | <p>(n) (1928) 7 Pat. 426, 116 I.O. 525, ('28) A.P. 441.<br/>         (o) (1897) 25 Cal. 9 P.O., <i>supra</i>.<br/>         (p) <i>Abdul Hamid Khan v. Pearce Mirza</i> (1936) 10 Luck. 550, 153 I. C. 373, ('35) A.O. 78.<br/>         (q) (1869) 12 W.R. 512, s.c. on review (1870) 14 W.R. 125.</p> |
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## CHAPTER IX.

### WILLS.

**S. 101** Works of authority: *Hedaya* and *Fatawa Alamgiri* (Baillie).—The leading authority on the subject of wills is the *Hedaya* (Guide), which was translated from the original Arabic into Persian by four Maulvis or Mahomedan lawyers and from Persian into English by Charles Hamilton, by order of Warren Hastings, when he was Governor-General of India. The *Hedaya* was composed by Shaikh Burhan-ud-Din Ali who flourished in the twelfth century. The author of the *Hedaya* belonged to the Hanafi School, and it is the doctrines of that school that he has principally recorded in that work. The *Fatawa Alamgiri* is another work of authority, and it has been accepted by the Courts in India as well as by the Privy Council as of greater authority than the *Hedaya*. It was compiled in the seventeenth century by command of the emperor Aurangzeb Alamgir. It is "a collection of the most authoritative *fatwas* or expositions of law on all points that had been decided up to the time of its preparation." The law there expounded is again the law of the Hanafi sect, as the Mahomedan sovereigns of India all belonged to that sect. The first volume of Baillie's Digest of Mahomedan law is founded chiefly on that work. Both the *Hedaya* and *Fatawa Alamgiri* deal with almost all topics of Mahomedan law, except that the Law of Inheritance is not dealt with in the *Hedaya*. The references to the *Hedaya* in this and subsequent chapters are given to the pages of Mr. Grady's Edition of Hamilton's *Hedaya*. The first volume of Baillie's Digest is referred to as "Baillie." The leading work on Shia law is *Sharaya-ul-Islam*, for which see the preliminary note to sec. 74 above.

**101. Persons capable of making wills.**—Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.

*Hedaya*, 673; Baillie, 627.

**Majority under Mahomedan Law.**—The age of majority as regards matter other than marriage, dower, divorce and adoption, is now regulated by the Indian Majority Act IX of 1875. Sec. 3 of the Act declares that a person shall be deemed to have attained majority when he shall have completed the age of eighteen years. In the case, however, of a minor of whose person or property a guardian has been appointed, or of whose property the superintendence has been assumed by a Court of Wards, the Act provides that the age of majority shall be deemed to have been attained on the minor completing the age of twenty-one years.

Minority under the Mahomedan law terminates on completion of the fifteenth year; therefore, before the passing of Act IX of 1875, a Mahomedan who had attained the age of fifteen years was competent to make a valid disposition of his property (Ameer Ali, 4th ed., Vol. I, pp. 42-43). But this rule of Mahomedan law, so far as regards matters other than marriage, dower and divorce (adoption not being recognized by that law), must be taken to be superseded by the provisions of the Majority Act, for the Act extends to the whole of British India (s. 1), and applies to every person domiciled in British India (s. 3). Hence minority in the case of Mahomedans, for purposes of wills, gifts, wakfs, etc., terminates not on the completion of the fifteenth year, but on completion of the eighteenth year (a).

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(a) Compare *Bai Gulab v. Thakordal* (1912) 36 Bom. 622, 17 I.C. 86.

**Shia law: suicide.**—A will made by a person after he has taken poison, or done any other act towards the commission of suicide, is not valid under the Shia law: *Baillie*, II, 232. In *Mazhar Husen v. Bodha Bibi* (b), the deceased first made his will, and afterwards took poison. It was held that the will was valid, though he had contemplated suicide at the time of making the will.

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**102. Form of will immaterial.**—A will (*wasyyat*) may be made either verbally or in writing.

*Writing not necessary.*—"By the Mahomedan law no writing is required to make a will valid, and no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained" (c). In a case before the Privy Council a letter written by a testator shortly before his death and containing directions as to the disposition of his property, was held to constitute a valid will (d). The mere fact that a document is called *tamluk-nama* (assignment) will not prevent it from operating as a will, if it possesses the substantial characteristics of a will (e). But where a Mahomedan executed a document which stated, "I have no son, and I have adopted my nephew to succeed to my property and title," it was held by the Privy Council that the document did not operate as a will. Nor did it operate as a gift, for there was no delivery of possession to the nephew by the deceased (f). An immediate and irrevocable disposition subject to the reservation of the usufruct for life operates as a gift and not as a will (g).

A Mahomedan will, though in writing, does not require to be signed (h); nor, even if signed, does it require attestation (i). The reason is that a Mahomedan will does not require to be in writing at all.

*Oral will, proof of.*—The burden of establishing an oral will is always a very heavy one; it must be proved with the utmost precision, and with every circumstance of time and place (j). The Court must be made certain that it knows what the speaker said and must from the circumstances and from the statement be able to infer for itself that testamentary effect was intended, in addition to being satisfied of the contents of the direction given (k).

**103. Bequests to heirs.**—A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator (l). Any single heir may consent so as to bind his own share (m).

(b) (1898) 21 All. 91.

(c) *Mahomed Attar v. Ahmed Bux* (1876) 25 W.R. 121 P.O.

(d) *Mazhar Husen v. Bodha Bibi* (1898) 21 All. 91; *Abdul Hameed v. Mahomed Yousuf* (1940) 1 M.L.J. 278, 187 I.C. 414, (48) A.M. 153.

(e) *Saied Karim v. Shalata Bibi* (1875) 7 N.W.P. 318; *Ishri Singh v. Baldeo* (1884) 11 I.A. 135, 141-143, 10 Cal. 792, 800-802.

(f) *Jeswant Singjee v. Jet Singjee* (1844) 3 M.I.A. 245, 258; *Macnaghten*, p. 124, case 54.

(g) *Mohammad v. Fakar Jahan* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 264, (22) A. P.O. 281.

(h) *Asha Bibi v. Alauddin* (1906) 28 All. 715.

(i) *In re Ahs Satar* (1905) 7 Bom.L.R. 558 [Cutchi Memon will]; *Sarabai v. Mahomed* (1919) 48 Bom. 641, 49 I.C. 637 [Cutchi Memon will].

(j) *Venkat Rao v. Nandoo* (1981) 55 I.A.

362, 133 I.C. 711, (31) A.P.O. 285.

(k) *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933, 168 I.C. 418, (37) A. P.O. 174; *Mt. Ishar Fatma Bibi v. Mt. Anwar Bibi* (1939) A.L.J. 642, 182 I.C. 801, (39) A.A. 348.

(l) *Ghulam Mohammad v. Ghulam Hussain* (1932) 59 I.A. 74, 54 All. 93, 136 I.C. 454, (32) A. P.O. 81; *Shek Muhammad v. Shek Imamuddin* (1865) 2 B.H.C. 50; *Ahmad v. Bai Bibi* (1916) 41 Bom. 877, 39 I.C. 58 [Bhagdari property]; *Muharram Ali v. Barket Ali* (1931) 12 Lah. 286, 123 I.C. 886, (30) A.L. 696; *Ghulam Mohammad v. Ghulam Hussain* (1932) 59 I.A. 74, 54 All. 93, 84 Bom.L.R. 510, 136 I.C. 464, (32) A. P.O. 81; *Bafatun v. Bilasi Khanum* (1903) 30 Cal. 688, (m) *Salayjee v. Fatima* (1923) 1 Rang. 60, 68, 71 I.C. 753, (22) A. P.O. 991 [P.O.].

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*Explanation.*—In determining whether a person is or is not an heir, regard is to be had, not to the time of the execution of the will, but to the time of the testator's death.

*Illustrations.*

[(a) A Mahomedan dies leaving him surviving a son, a father, and a paternal grandfather. Here the grandfather is not an "heir," and a bequest to him will be valid without the assent of the son and the father. "

(aa) A Mahomedan dies leaving a son, a widow and a grandson by a predeceased son. The grandson is not an heir and a bequest to him is valid to the extent of one-third without the consent of the son and widow (n).

(b) A, by his will, bequeaths certain property to his father's father. Besides the father's father, the testator has a son and a father living at the time of the will. The father dies in the lifetime of A. The bequest to the grandfather cannot take effect, unless the son assents to it, for the father being dead, the grandfather is an "heir" at the time of A's death.

(c) A, by his will, bequeaths certain property to his brother. The only relatives of the testator living at the time of the will are a daughter and the brother. After the date of the will, a son is born to A. The son, the daughter and the brother all survive the testator. The bequest to the brother is valid, for though the brother was an expectant heir at the date of the will, he is not an "heir" at the death of the testator, for he is excluded from inheritance by the son. If the daughter and the brother had been the sole surviving relatives, the brother would have been one of the heirs, in which case the bequest to him could not have taken effect, unless the daughter assented to it: Baillie, 625, *Hedaya*, 672.

(d) A bequeaths property to one of his sons as his executor upon trust to expend such portion thereof as he may think proper "for the testator's welfare hereafter by charity and pilgrimage," and to retain the surplus for his sole and absolute use. The other sons do not consent to the legacy. The bequest is void, for it is "in reality an attempt to give, under colour of a religious bequest," a legacy to one of the heirs: *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 3 I. A. 291. If the bequest had been exclusively for religious purposes, and if those purposes had been sufficiently defined, it would have been valid to the extent of the bequeathable third.

(e) A Mahomedan leaves him surviving a son and a daughter. To the son he bequeaths three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance: see *Fatma Bibee v. Ariff Ismailjee* (1881) 9 C. L. R. 66.]

*Hedaya*, 621; Baillie, 625, as to Explanation. Under the Mahomedan law a bequest to an heir is not valid without the consent of the other heirs; and such consent may be inferred from their conduct (o). The policy of that law is to prevent a testator from interfering by will with the course of devolution of property according to law among his heirs, although he may give a specified portion, as much as a third to a stranger (p). The reason is that a bequest in favour of an heir would be an injury to the other heirs, as it would reduce their share, and "would consequently induce a breach of the ties of kindred" (*Hedaya*, 671). But it cannot be so if the other heirs, "having arrived at the age of majority," consent to the bequest. The consent necessary to give effect to the bequest must be given after the death of the testator, for no heir is entitled to any interest in the property of the deceased in his lifetime. The

(n) *Abdul Bari v. Nasir Ahmad* ('33) A.O. 142, 150 I.C. 390.

(o) *Mahomed Hussain v. Akhbari* (1934) 36 Bom. L.R. 1155, 155 I.C. 334.

('25) A.B. 84.

(p) *Khajooroonissa v. Rowshan Jehan* (1876) 2 Cal. 184, 196, 3 I.A. 291, 307.

fact that an heir consenting to a bequest to a co-heir is an insolvent at the time when the consent is given, is immaterial; the consent is effective all the same (g).

If the succession is governed by custom which does not destroy the testamentary capacity of the owner the rule still applies. The bequest to an heir is invalid without the consent of those who are the other heirs according to the custom (r).

Where a bequest is made to an heir subject to a condition which is void as being repugnant to the Mahomedan law, e.g., that the legatee shall not alienate the property bequeathed, and the other heirs consent to the bequest, the legatee will take the property absolutely as he would have done if he were a stranger (s). Similarly where a bequest is made to an heir subject to the condition that in the event of his death the property shall go to X, and the other heirs assent to the legacy, the condition attached to the legacy being void, he will take the property absolutely (t). See sec. 138 below.

*Bequests to heirs and non-heirs.*—See notes to sec. 104 under the same head.

*Bequest of remainder.*—A bequeaths the rents of a house to one of his sons for life, and after his death to a charitable society for the benefit of the poor. The other sons do not consent to the legacy. The bequest to the son being void for want of assent of the other sons, the subsequent bequest to charity also fails (u).

**Shia law.**—According to the Shia law, a testator may leave a legacy to an heir so long as it does not exceed one-third of his estate. Such a legacy is valid without the consent of the other heirs. But if the legacy exceeds one third, it is not valid unless the other heirs consent thereto; such consent may be given either before or after the death of the testator (v): Baillie, II, 244. But such consent cannot be given after previous repudiation (w). The consent of the heirs will not, however, validate the illegal conferment of a power of appointment or a transgression of rule against perpetuities (w1). In *Fahmida v. Jafri* (x), the High Court of Allahabad laid it down as a broad proposition of law that where a bequest to an heir exceeds one-third, and the other heirs do not consent to the bequest, the bequest is void in its entirety. *Fahmida's* case was followed by the same High Court in *Amrit Bibi v. Mustafa* (y). But in the first case the bequest was of the entire property to one heir (daughter) to the exclusion of the other heir (another daughter). In the second case also the bequest was substantially of the whole of the testator's property to one heir (testator's widow) to the exclusion of the other heir (daughter's daughter), and the Court treated it as a case of entire exclusion of the daughter's daughter. In the latest Allahabad case on the subject (z), the testatrix had two daughters, and it was not clear whether the bequest to one of them exceeded one-third. In any event the finding of the Court was that each of the two daughters had a portion of the estate bequeathed to her. On these facts the Court refused to apply the rulings in the two earlier cases, and upheld the bequest. As to the decision in the earlier cases it was said that it should be confined to cases where

- (g) *Azis-un-Nissa v. Chiens* (1920) 42 All 593, 59 I.O. 296; *Imdadul Rahman v. Purbi Din* (1938) 13 Luck. 174, 166 I.O. 980; ('37) A.O. 239, disapproving *Kali Charan v. Mohammad Jami* (1930) All L.J. 588, 122 I.O. 762, ('30) A.A. 498.
- (r) *Ibrahim Ullah Khan v. Mt. Fakia Khan* (1937) 12 Luck. 592, 165 I.C. 322, ('37) A.O. 4.
- (s) *Abdul Karim v. Abdul Qayum* (1906) 23 All. 324.
- (t) *Nasir Ali v. Sughra Bibi* (1920) 1 Lah. 302, 54 I.C. 853.
- (u) *Fatima Bibee v. Arif Ismailjee* (1881) 9 C.L.R. 66, with facts slightly altered.
- (v) *Husaini Begam v. Muhammad Mehdi*

- (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 840, dissenting from *Fahmida v. Jafri* (1908) 30 All. 153 where it was held that the consent must be given after the death of the testator.
- (w) *Mahabir Prasad v. Mustafa* (1937) 41 Cal W.N. 933, 168 I.C. 418, ('37) A.P.C. 174.
- (w1) *Ali Raza v. Nawazish Ali* (1943) O.W.N. 50, 206 I.O. 7, ('48) A.O. 243.
- (x) (1908) 30 All. 153.
- (y) (1924) 46 All. 28, 77 I.C. 66, ('24) A.A. 20.
- (z) *Husaini Begam v. Muhammad Mehdi* (1927) 49 All. 547, 100 I.C. 673, ('27) A.A. 840.



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the whole estate was bequeathed to one heir and the other heirs were excluded entirely from inheritance. This, it is submitted, is the correct view. The only authoritative text on the subject is to be found in *Sharaya-ul-Islam*, where it is said: "If a person should make a will *excluding* some of his children from their shares in his succession, the exclusion is not valid." The text further goes on to say that the better view is that the words of exclusion "are quite futile and of no efficacy whatever": Baillie, II, 238. The meaning of this text would appear to be that where a bequest is made of the *entire* property to one heir to the exclusion of the other heirs, the will is to be read as if it did not contain any disposition of the property. But it does not follow that where a bequest to an heir is not of the *entire* estate, but merely exceeds the legal third, such bequest also is void in its entirety.

**104. Limit of testamentary power.**—A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator (a).

*Hedaya*, 671; Baillie, 625.

*Origin of the rule.*—"Wills are declared to be lawful in the Koran and the traditions; and all our doctors, moreover, have concurred in this opinion": *Hedaya*, 671. But the limit of one-third is not laid down in the Koran. This limit derives sanction from a tradition reported by Abee Vekass. It is said that the Prophet paid a visit to Abee Vekass while the latter was ill and his life was despaired of. Abee Vekass had no heirs except a daughter, and he asked the Prophet whether he could dispose of the whole of his property by will to which the Prophet replied saying that he could not dispose of the whole, nor even two thirds, nor one half, but only one-third: *Hedaya*, 671. But though the limit of one third is not prescribed by the Koran, there are indications in the Koran that a Mahomedan may not so dispose of his property by will as to leave his heirs destitute. See Sale's Koran, Surah IV, and Preliminary Discourse, section VI.

*Consent of heirs.*—It will be seen from this and the preceding section that the power of a Mahomedan to dispose of his property by will is limited in two ways, first, as regards the *persons* to whom the property may be bequeathed, and, secondly, as regards the *extent* to which the property may be bequeathed. The only case in which a testamentary disposition is binding upon the heirs is where the bequest does not exceed the legal third and it is made to a person who is not an heir. But a bequest in excess of the legal third may be validated by the consent of the heirs, similarly, a bequest to an heir may be rendered valid by the consent of the other heirs. The reason is that the limits of testamentary power exist solely for the benefit of the heirs, and the heirs may, if they like, forgo the benefit by giving their consent. For the same reason, if the testator has no heirs, he may bequeath the whole of his property to a stranger: see Baillie, 625.

If the heirs do not consent, the remaining two thirds must go to the heirs in the shares prescribed by the law. The testator cannot reduce or enlarge their shares, nor can he restrict the enjoyment of their shares (b).

*Consent cannot be rescinded.*—As to the consent of heirs to a legacy exceeding the legal third, it is to be remembered that the consent once given cannot be rescinded: *Hedaya*, 671.

(a) *Khalooroonessa v. Rowshan Jehan*  
(1876) 2 Cal 184, 8 I.A. 291.  
*Oherachom v. Yalia* (1865) 2 M.

H.O. 850.  
(b) *Jeeva v. Yacoub Ally* (1928) 6 Rang  
542, 114 I.O. 303, (28) A.R. 307.

*Consent may be express or implied.*—The consent need not be express: it may be signified by conduct showing a fixed and unequivocal intention. *A* bequeaths the whole of his property, which consists of three houses, to a stranger. The will is attested by his two sons who are his only heirs. After *A*'s death the legatee enters into possession and recovers the rents with the knowledge of the sons and without any objection from them. These facts are sufficient to constitute consent on the part of the sons, and the bequest will take effect as against the sons and persons claiming through them (c).

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*Bequests to heirs and non-heirs.*—Where by the same will a legacy is given to an heir and a legacy also to a non-heir, the legacy to the heir is invalid unless assented to by the other heirs, but the legacy to the non-heir is valid to the extent of one-third of the property. *A* bequeaths 1/3 of his property to *S*, a non-heir, and 2/3 to *H*, one of his heirs. The other heirs do not assent to the bequest to *H*. The result is that *S* will take 1/3 under the will, and the remaining 2/3 will be divided among all the heirs of *A* (d). Similarly if *A* bequeaths the whole of his property to his wife and a non-heir, and the bequest to the wife is not assented to by the other heirs of *A*, the non-heir will take 1/3 under the will (that being the maximum disposable under the will), and the remaining 2/3 will be divided among the heirs of *A* (e).

*Bequest for pious purposes.*—A bequest, though it be for pious purposes, can only be made to the extent of the bequeathable third (f).

*Commission to executor.*—A commission to an executor by way of remuneration is "a gratuitous bequest, and . . . certainly not in any sense a debt." It is therefore subject to the rules contained in this and the preceding section (g).

*Cutchi Memons and Khojas.*—As to Cutchi Memons and Khojas see sections 16A and 16B *supra*.

*Shia law.*—Under the Shia law, the consent necessary to validate a bequest exceeding the legal third may be given either *before* or *after* the death of the testator: Baillie, II, 233.

**105. Abatement of legacies.**—If the bequests exceed the legal third, and the heirs refuse their consent, the bequests abate rateably.

*Hedaya*, 760: Baillie, 636-637.

*Bequests for pious purposes.*—Bequests for pious purposes fall under three classes according to the purpose for which they are made, namely:—

(1) *Bequests for farais*, that is, purposes expressly ordained in the Koran, namely, (i) *haj* (pilgrimage), (ii) *zakat* (tithe or poor's rate), and (iii) *expiation*, e.g., for prayers missed by a Mahomedan.

(2) *Bequests for wajibat*, that is, purposes not expressly ordained, but which are in themselves necessary and proper, namely, *sadaqa filrat* (charity given on the day of breaking fast), and sacrifices.

- (c) *Daulatram v. Abdul Kayum* (1902) 26 Bom. 497. See also *Sharifa Bibi v. Gulam Mahomed* (1892) 16 Mad. 43; *Mahomed Hussain v. Aishabai* (1934) 36 Bom. L.R. 1155, 155 I.O. 334, ('35) A.B. 84; *Ma Khatoon v. Ma Mya* (1936) 165 I.O. 232, ('36) A.R. 448; *Faqir Mahomed Khan v. Hasan Khan* (1941) 16 Luck. 93, 190 I.O. 132, ('41) A.O. 25.
- (d) *Muhammad v. Aulia Bibi* (1920) 42 All. 497, 61 I.O. 947; *Ghulam Jan-*

- nat v. Rahmat Din* (1934) 15 Lah. 889, 153 I.O. 83, ('34) A.L. 427.
- (e) (1920) 42 All. 497, at p. 502, 61 I.O. 947, *supra*; *Abdul Bari v. Nasir Ahmed* ('88) A.O. 142, 150 I.O. 330.
- (f) *Badrul Islam Ali Khan v. Ali Begum* (1935) 16 Lah. 782, 155 I.O. 465, ('35) A.L. 251.
- (g) *Aga Mahomed Jafer v. Kooloom Bessie* (1897) 25 Cal. 9, 18 P.O.; *Salayjee v. Fatima* (1923) 1 Rang. 60, 71 I.O. 753, ('22) A.P.O. 891.

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(3) Bequests for *nawafil*, that is, bequests of a purely voluntary nature, e.g., bequests to the poor, or for building a mosque, or a bridge, or an inn for travellers.

Of those three classes bequests of the first class take precedence over bequests of the second and the third class, and bequests of the second class take precedence over bequests of the third class. In class (1) again, a bequest for *haj* must be paid before a bequest for *zakat* or tithe, and a bequest for *zakat* must be paid before a bequest by way of expiation.

*Hedayat*, 688; Baillie, 653-654.

**Shia law.**—The Shia law is different from that law does not recognize the principle of rateable distribution. Under that law if a testator bequeaths 1/3 of his estate to *A*, 1/4 to *B*, and 1/6 to *C*, and the heirs refuse to confirm the bequests, *A*, the legatee first named, takes 1/3, and *B* and *C* take nothing: Baillie, II, 235. But if, instead of 1/3, 1/12 was given to *A*, then *A* would take 1/12, and *B* would take 1/4, but *C*, who is last in order would not be entitled to anything, as 1/12+1/4 exhausts the legal third. To the above rule there is an exception—where there are successive bequests of the exact *third* to two different persons, as where a testator bequeaths 1/3 of his property to *A*, and 1/3 again to *B*. In such a case the later bequest would be a revocation of the earlier bequest, so that *B* would take the whole of the one-third, and *A* would take nothing: Baillie, II, 235. If a will is made of the whole property in favour of a single legatee, then no doubt that legatee may claim that he should take one-third of the property. But where there are different objects provided for in the document, there is no rule by which each object should be reduced to one-third of the amount and therefore the document does not appear to be valid as a will (*h*).

**106. Bequest to unborn person.**—A bequest to a person not yet in existence at the testator's death is void; but a bequest may be made to a child in the womb, provided it is born within six months from the date of the will.

The legatee, according to Mahomedan law, must be a person *competent* to receive the legacy: Baillie, 624; he must therefore be a person in existence at the death of the testator (1). As to bequests to a child in the womb, see *Hedayat*, 674.

**107. Lapse of legacy.**—If the legatee does not survive the testator, the legacy will lapse, and form part of the estate of the testator.

Compare the Indian Succession Act, 1925, sec. 105, which, however, does not apply to Mahomedans.

**Shia law.**—Under the Shia law, the legacy would, in such a case, pass to the heirs of the legatee, unless it is revoked by the testator; but if the legatee should die without leaving any heir, the legacy would pass to the heirs of the testator (*j*). Baillie, II, 247.

**108. Subject of legacy.**—It is not requisite to the validity of a bequest that the thing bequeathed should be in existence at the time of making the will; it is sufficient if it exists at the time of the testator's death.

(A) *Kanus Kubra Bibi v. Musafaruddin Haider* (1940) A.L.J. 504, 192 I. O. 410, ('40) A.A. 462.  
(i) *Abdul Cadur v. Turner* (1884) 9 Bom.

153.  
(j) *Musaini Begam v. Muhammad Mehdi* (1927) 49 All. 547, 100 I.O. 673, ('27) A.A. 840.

Baillie, 624. The reason is that a will takes effect from the moment of the testator's death, and not earlier. The subject of a *gift*, however, must be in existence *at the time of the gift*: see sec. 136.

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**108A. Subject of Bequest.**—A bequest may be made of any property which is capable of being transferred, and which exists at the testator's death. It need not be in existence at the date of the will.

Baillie, 624, 665-666.

**108B. Bequest in futuro.**—A bequest in futuro is void: as to gift, see sec. 136.

**108C. Contingent bequest.**—A contingent bequest is void: as to gift, see sec. 137.

**108CC. Conditional bequest.**—A bequest with a condition which derogates from the completeness of the grant takes effect as if no condition was attached to it, for the condition is void (*k*). But *Amjad Khan's* case (*l*) must be taken into account before applying the doctrine to destroy a life estate. See sec. 44. As to gifts, see s. 138.

**108D. Alternative bequest.**—An alternative bequest has been held to be valid.

A Cutchi Memon, who had no son at the date of his will, bequeathed the residue of his property in effect as follows: "Should I have a son, and if such son be alive at my death, my executors shall hand over the residue of my property to him; but if such son dies in my lifetime leaving a son, and the latter is alive at my death, then my executors shall hand over the residue to him. But if there be no son or grandson alive at my death, my executor shall apply the residue to charity." The testator died without having ever had a son. It was held that the gift was not conditioned *in futuro*, but it was an absolute gift in the alternative and that the charity was entitled to the residue (*m*).

**109. Revocation of bequest.**—A bequest may be revoked either expressly or by implication.

*Hedaya*, 674; Baillie, 628. Revocation is express, when the testator revokes the bequest in express terms, either oral or written. It is implied, when he does an act from which revocation may be inferred.

It is doubtful whether, if a testator denies that he ever made a bequest, the denial operates as a revocation; but the better opinion seems to be that it does not: *Hedaya*, 675; Baillie, 630.

**110. Implied revocation.**—A bequest may be revoked by an act which occasions an addition to the subject of the bequest, or an extinction of the proprietary right of the testator.

(k) *Ma Myyin v. P. L. S. A. R. S. Chettyar* (1985) 158 I.C. 848, ('35) A. R. 818.

(l) (1929) 56 I.A. 219, 4 Luck. 305, 116

I.O. 405, ('29) A.P.C. 149.  
(m) *Advocate-General v. Jimbabat* (1917) 41 Bom. 181, 284-286, 31 I.C. 106 [Cutchi Memon will].

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[(a) A bequest of a piece of land is revoked, if the testator subsequently builds a house upon it.

(b) A bequest of a piece of copper is revoked, if the testator subsequently converts it into a vessel.

(c) A bequest of a house is revoked, if the testator sells it, or makes a gift of it to another.]

*Hedaya*, 674, 675, Bailie, 628-629 The illustrations are taken from the *Hedaya*.

**111. Revocation by subsequent will.**—A bequest to a person is revoked by a bequest in a *subsequent will* of the same property to another. But a subsequent bequest, though it be of the same property, to another person in the *same will*, does not operate as a revocation of the prior bequest, and the property will be divided between the two legatees in equal shares.

*Hedaya*, 675; Bailie, 630.

**111A. Probate of a Mahomedan will.**—(1) A Mahomedan will may, after due proof, be admitted in evidence even though no probate has been obtained (n).

(2) In the case of a Mahomedan will, the estate of the testator vests in the executor, if he accepts office, from the date of the testator's death, and he has the power to alienate the estate for the purpose of administering it, and has all other powers of an executor under the Probate and Administration Act, 1881, and the corresponding provisions of the Indian Succession Act, 1925 (o). See sec. 30 and notes.

The same rule applies to wills of Cutchi Memons (p) and Khojas (q).

As to suits for recovery of debts, see. 38.

**111B. Letters of administration.**—Except as regards debts due to the estate of the deceased [sec. 38], no letters of administration are necessary to establish any right to the property of a Mahomedan who has died intestate [Indian Succession Act, 1925, sec. 212 (2)].

**112. Executor need not be a Mahomedan.**—It is not necessary that the executor of the will of a Mahomedan should be a Mahomedan.

(n) *Shah Moosa v. Shah Essa* (1884) 8 Bom. 241, 255, *Abdul Karim v. Karmali* (1920) 22 Bom. L.R. 708, 58 I.C. 270, *Mahomed Yusuf v. Hargovandas* (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392, *Mahomed Hussein v. Ashaba* (1934) 36 Bom. L.R. 1155, 155 I.C. 334, ('35) A.B. 84.  
(o) *Yenkata Subanna v. Ramayya* (1932) 59 I.A. 112, 55 Mad. 443, 136 I.C. 111, ('32) A.P.C. 92 [a case

of a Hindu will, but applies also to a Mahomedan will]: *Shema v. Ahmed Omer* (1931) 53 Bom. L.R. 1050, 135 I.C. 817, ('31) A.B. 533; (1884) 8 Bom. 241, 255, *supra*, (1923) 47 Bom. 231, 70 I.C. 268, ('22) A.B. 392, *supra*.  
(p) *Haji Ismail, in the matter of the will of* (1880) 6 Bom. 452.  
(q) (1920) 22 Bom. L.R. 708, 58 I.C. 270, *supra*.

A Mahomedan may appoint a Christian, a Hindu, or any non-Mahomedan to be his executor (r).

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**113. Powers and duties of executors.**—The powers and duties of executors of a Mahomedan will are determined by the provisions of the Indian Succession Act, 1925, in so far as they are applicable to Mahomedans. See sec. 30 and notes.

Per Sargent, *C.J.*, in *Shah Moosa v. Shah Essa* (s). The Probate and Administration Act, 1881, applied amongst others to Mahomedans. Before the passing of that Act the powers and duties of Mahomedan executors were regulated by the Mahomedan law. After the passing of that Act, they were determined by the provisions of that Act. The Probate and Administration Act has been replaced by the Indian Succession Act, 1925.

When there are several executors, the powers of all may, in the absence of any direction to the contrary in the will, be exercised by any one of them who has proved the will: Indian Succession Act, 1925, sec. 311. But if no probate has been obtained they must all act jointly; none of them is entitled to represent the estate alone or to exercise any of the powers of an executor alone (t)

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<p>(r) <i>Mohammud Ameenooddeen v. Mohammud Kubeeroodeen</i> (1825) 4 S.D. A [Beng] 49, 55; <i>Henry Imlach v. Zuhoroonees</i> (1828) 4 S. D. A</p>	<p>[Beng] 301, 303 (s) (1884) 8 Bom. 241, 256 (t) (1884) 8 Bom. 241, 255-256, <i>supra</i></p>
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## CHAPTER X.

### DEATH-BED GIFTS AND ACKNOWLEDGMENTS.

- S. 114**      **114. Gift made during *marz-ul-maut*.**—A gift made by a Mahomedan during *marz-ul-maut* or death-illness cannot take effect beyond a third of his estate after payment of funeral expenses and debts, unless the heirs give their consent, after the death of the donor, to the excess taking effect; nor can such a gift take effect if made in favour of an heir unless the other heirs consent thereto after the donor's death (a).

*Explanation.*—A *marz-ul-maut* is a malady which induces an apprehension of death in the person suffering from it and which eventually results in his death.

*Hedaya*, 684, 685; *Baillie*, 551-552

*Marz-ul-maut* (b).—It is an essential condition of *marz-ul-maut*, that is, death-illness, that the person suffering from the *marz* (malady) must be under an apprehension of *maut* (death). "The most valid definition of death-illness is that it is one which it is *highly probable* will issue fatally": *Baillie*, 552. Where the malady is of long continuance, as, for instance, consumption or albuminuria, and there is no immediate apprehension of death, the malady is not *marz-ul-maut*; but it may become *marz-ul-maut* if it subsequently reaches such a stage as to render death highly probable, and does in fact result in death (c). According to the *Hedaya*, a malady is said to be of "long continuance," if it has lasted a year; a disease that has lasted a year does not constitute *marz-ul-maut*, for "the patient has become familiarized to his disease, which is not then accounted as sickness": *Hedaya*, 685. But "this limit of one year does not constitute a hard-and-fast rule, and it may mean a period

- (a) *Wazir Jan v. Saayud Altaf Ali* (1887) 9 All. 357; *Fazl Ahmad v. Rahim Bibi* (1918) 49 All. 238, 244, 51 I.O. 638; *Mt. Sakina Begum v. Khalifa Hafiz-ud-din* (1941) 194 I.O. 77, ('41) A.L. 58
- (b) *Fatima Bibee v. Ahmad Baksh* (1903) 31 Cal. 319, *affn* by P.C. (1908) 35 Cal. 271, 35 I.A. 67 [albuminuria for upwards of a year—not *marz-ul-maut*]; *Ibrahim Goolam Arif v. Saiboo* (1908) 35 Cal. 1, 22, 34 I.A. 107, 177 [Sudden bursting of a blood vessel in the stomach—not a case of *marz-ul-maut*]; *Ladbi Bibee v. Bibbin Hebee* (1874) 6 N.W.P. H.O. 159; *Hassarat Bibi v. Golam Jafar* (1898) 8 C.W.N. 57 and *Mt. Zanrao v. Sher Mahomed* (1934) 151 I.C. 761, ('34) A. Peah 91 [both cases of asthma—not *marz-ul-maut*]; *Mahammed Gulshere Khan v. Mirum Begum* (1881) 8 All. 781 [lingering illness—no *marz-ul-maut*]; *Sarabai v. Rahabai* (1906) 30 Bom. 537 [paralysis—not a case of *marz-ul-maut*]; *Rashid Karmali v. Sherbenoo* (1907) 31 Bom. 264 [rapid consumption—held *marz-ul-maut*]; *Jinjura v. Mohammed* (1922) 49 Cal. 477, 489-494, 67 I.O. 77, ('22) A.O. 429 [not a case of *marz-ul-maut*]; *Fazl Ahmad v. Rahim Bibi* (1918) 49 All. 238, 51 I.O. 638 and *Muzi Imran v. Ibn Hussan* (1933) All. L.J. 53, 147 I.O. 835, ('33) A.A. 341 [both cases of galloping consumption—held *marz-ul-maut*]; *Jahar Ali Khan v. Nasimunnissa Bibi* (1937) 65 Cal. L.J. 84, ('37) A.C. 500 [lingering consumption—held not *marz-ul-maut*]; *Fazlur v. Mohammed* (1917) 3 Pat. L.W. 232, 43 I.O. 196.
- (c) (1918) 49 All. 238, 243-244, 51 I.O. 638, *supra*.

of about one year" (d). In short, a gift must be deemed to be made during *marz-ul-maut*, if, as observed by the Privy Council, it was made "under pressure of the sense of the imminence of death" (e).

To constitute a malady *marz-ul-maut*, there must be (1) proximate danger of death, so that there is a preponderance of apprehension of death, (2) some degree of subjective apprehension of death in the mind of the sick person, and (3) some external indicia, chief among which would be inability to attend to ordinary avocations (f). It is not necessary, however, to come to a definite finding that the disease which caused the apprehension of death was the immediate cause of death (g).

**Shia law.**—The Shia law as to what constitutes *marz-ul-maut* is the same. In *Khurshed v. Fayaz* (h) a gift to one heir was held to be valid to the extent of one-third without the consent of the other heirs. This was considered in a Madras case (i) to be tenable only if the donor was a Shia of the Ithna Ashari school and it was held that a death-bed gift by an Ismailiya Shia to an heir without the consent of the co-heirs is altogether invalid.

**Sale.**—The provisions of this section do not apply to a transfer for consideration, e.g., a sale (j). A transfer of property made by a husband to his wife in lieu of dower is in effect a sale, though the transaction may be described as a gift (k). On the other hand, a transaction, though in reality a gift, may be described as a sale to evade the provisions of the law relating to gifts made during *marz-ul-maut*. Such a transaction will be governed by the law relating to gifts made during *marz-ul-maut* (l).

**115. Conditions necessary for its validity.**—A gift made during *marz-ul-maut* is subject to all the conditions necessary for the validity of a *hiba* or gift, including delivery of possession by the donor to the donee.

Baillie, 551 As to the conditions requisite to the validity of a *hiba* or gift, see the Chapter on Gifts below. See also the cases cited in the preceding section. A death-bed gift is essentially a *hiba* or gift, though the limits of the donor's power to dispose of his property by such a gift are the same as the limits of a gift, including delivery of possession by the donor to the donee before the death of the donor.

**116. Death-bed acknowledgment of debt.**—An acknowledgment of a debt may be made as well during death-illness as "in health."

(d) (1903) 31 Cal. 319, at p. 326, *supra*.  
(e) (1908) 35 Cal. 1, 22, 24 I.A. 167, 177, *supra*.

(f) (1906) 80 Bom. 537, 551, *supra*;  
(1907) 31 Bom. 284, *supra*; (1922)  
49 Cal. 477, 490, 67 I.O. 77, ('22)  
A.O. 429, *supra*; *Abdul Ahad v. Ahmad Nawaz* (1931) 12 Lah. 683, 132 I.O. 891, ('32) A.L. 229; *Mohammad Ayub Khan v. Mt. Gauhar Begum* (1932) 7 Luck. 705, 137 I.C. 804, ('32) A.O. 238; *Tufail Ahmed v. Umme Khatoon*, (1938) A.L.J. 16, 174 I.O. 465, ('38) A.A. 145.

(g) *Mt. Sakina Begum v. Khalifa Hafizuddin* (1941) 194 I.O. 77, ('41) A.L. 58.

(h) (1914) 36 All. 289, 23 I.O. 255; *cf. Musi Imran v. Ibn Hasan* (1933)

All.L.J. 53, 147 I.O. 835, ('39) A.A. 341; *Sajjad Hussain v. Mahomed Sayid Hasan* (1934) All.L.J. 71, 154 I.O. 434, ('34) A.A. 71 [presumably a Shia case as the last case is cited].

(i) *Sharif Ali v. Abdul Ali Saifaboo* (1939) 71 Mad.L.J. 247, 163 I.O. 626, ('39) A.M. 484.

(j) *Fazi Ahmad v. Rahim Bidi* (1918) 40 All. 238, 244-245, 51 I.O. 638.

(k) *Esحاق v. Abedunnessa* (1914) 42 Cal. 861, 28 I.O. 692; *Sadiq Ali v. Mt. Amiran* ('29) A.O. 439, 121 I.O. 87; *cf. Mahabir Prasad v. Mustafa* (1937) 41 Cal. W.N. 933, 168 I.O. 418, ('37) A.P.O. 174.

(l) (1918) 40 All. 288, 244-245, 51 I.O. 636, *supra*.



- S. 116** When the *only proof* of a debt is an acknowledgment made during *marz-ul-maut* or death-illness, the debt must not be paid until after payment of debts acknowledged by the deceased while he was "in health" and of debts proved by other evidence. An acknowledgment of a debt made during death-illness in favour of an *heir* is no proof at all of the debt, and no effect can be given to it.

*Heslaya*, 436, 437, 438, 684, 685; *Baillie*, 693-694. This section is to be read with that part of sec. 29 which refers to *priority of debts*.

## CHAPTER XI.

### GIFTS.

**117. Hiba or gift.**—A *hiba* or gift is “a transfer of property, made immediately, and without any exchange,” by one person to another, and accepted by or on behalf of the latter.

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*Hedaya*, 482; Baille, 515. See Transfer of Property Act, 1882, sec. 122, and also sec. 129.

**118. Persons capable of making gifts.**—Every Mahomedan of sound mind and not a minor may dispose of his property by gift.

*Hedaya*, p. 524 As to minority, see notes to sec. 101

**119. Gift with intent to defraud creditors.**—There must be in every gift a bona fide intention on the part of the donor to transfer the property from the donor to the donee (*a*). A gift made with intent to defraud the creditors of the donor is voidable at the option of the creditors. Such intention however cannot be *inferred* from the mere fact that the donor owed some debts at the time of the gift (*b*).

See Transfer of Property Act, 1882, sec. 53.

**120. Gift to unborn person.**—A gift to a person not yet in existence is void (*c*).

*Provision for maintenance of donee and his male heirs.*—It has been held by the Chief Court of Oudh that a gift by one person to another of a *guzara* (maintenance allowance) for the lifetime of the donee and after his death to his male heirs, is a valid gift under the Mahomedan law (*d*). It would, however, not be valid, if none of the male heirs of the donee was in existence at the date of the gift.

**121. Extent of donor's power.**—A gift, as distinguished from a will, may be made of the whole of the donor's property, and it may be made even to an heir.

(a) *Sultan Miya v. Afibakhatoon Bibi* (1932) 59 Cal. 557, 193 I.O. 733, ('32) A.C. 497.  
(b) *Asim-un-nissa v. Dale* (1871) 8 Mad. H. C. 455, 468-469; *Abdul Hye v. Mir Mohamed* (1896) 11 I.A. 10, 10 Cal. 616; *Mscnaghten* p. 217 (case 15), p. 510 (case 44); *Ameer*

*All*, 4th ed., I., pp. 51-54.  
(c) *Abdul Cadur v. Turner* (1884) 9 Bom. 163; *Mahomed Shah v. Official Trustees of Bengal* (1909) 36 Cal. 431, 2 I.O. 291.  
(d) *Mt. Sartaj v. Muhammad* (1931) 6 Luck. 423, 129 I.O. 322, ('31) A. O. 6.

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"The policy of the Mahomedan law appears to be to prevent a *testator* interfering by *will* with the course of the devolution of property according to law among his *heirs*, although he may give a specified portion, as much as a third to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms" (c).

A Mahomedan may dispose of the whole of his property by gift in favour even of a *stranger*, to the entire exclusion of his *heirs*.

**122. Gift of actionable claims and incorporeal property.**—Actionable claims and incorporeal property may form the subject of gift equally with corporeal property.

[A gift may be made of debts, negotiable instruments, or of Government promissory notes (f); of *malikana* (g) or of *zemindari* (h) rights; also of property let on lease (i), and property under attachment (j). Similarly, a gift may be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine (k). So also an insurance policy may be assigned and the mere fact that the money was to be realized in future is not enough to make it a gift in futuro (l). In short a gift may be made of anything which comes within the definition of the word "*mat*," that is, property, including actionable claims (m).]

"*Hiba* in its literal sense signifies the donation of a thing from which the donee may derive a benefit": *Hedaya*, 482. "Gift, as it is defined in law, is the conferring of a right of property in something specific, without an exchange": *Baillie*, 515

The cases cited above would not have arisen at all, had it not been for the wrong notion which prevailed at one time that *khas* or physical possession was necessary in all cases to constitute a valid gift. Following that notion, it was contended in those cases that corporeal property alone could form the subject of gift, as that was the only kind of property that was capable of *khas* or physical possession. But that notion has long since been rejected as erroneous, and it has been held that when the subject of gift is not capable of physical possession as in the case of choses in action or incorporeal rights, the gift may be completed by any act on the part of the donor showing a clear intention to divest himself of ownership in the property. Note that debts, negotiable instruments and Government promissory notes are all choses in action, or, to use the language of the Transfer of Property Act, actionable claims. See sec. 128 below

**123. Gift of equity of redemption.**—(1) A gift may be made by a mortgagor of his equity of redemption.

(2) There is a conflict of opinion whether a gift of an equity of redemption, where the *mortgagee* is in possession of the mortgaged property at the date of the gift, is valid.

- (a) *Khajooramdas v. Kowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291, 307; *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1905) 28 All. 439, 449, 33 I.A. 68, 75; *Sadiq Husain v. Hashim Ali* (1916) 43 I.A. 212, 221, 88 All. 627, 645-646, 36 I.C. 104.  
(f) *Mullick Abdul Gufoor v. Mulska* (1884) 10 Cal. 1112, 1125.  
(g) *Id.*, p. 1125.  
(h) *Id.*, p. 1126.

- (i) *Id.*, p. 1125.  
(j) *Anwari Begam v. Nazam-ud-din Shah* (1898) 21 All. 165, 167.  
(k) *Ahmad-ud-din v. Itahi Baksh* (1912) 34 All. 465, 14 I.C. 587.  
(l) *Sadiq Ali v. Zahida Begum* (1939) All. 957, (1939) A.L.J. 1103, ('88) A.A. 744.  
(m) *Mirza Abid v. Munnoo Bibi* (1927) 2 Luck. 496, 102 I.C. 72, ('27) A.O. 261.

The High Court of Bombay has held that it is not (n). On the other hand, it has been held by the High Court of Calcutta, that it is valid (o). The latter, it is submitted, is the correct view.

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The Bombay High Court does not hold that an equity of redemption cannot form the subject of a gift in any case. What it does hold is that a gift of an equity of redemption is not valid if the mortgaged property at the time of gift is in the possession of the mortgagee. The ground of the Bombay decisions is that delivery of possession by the donor to the donee is a condition essential to the validity of a gift, and the mortgagor cannot deliver possession if the mortgagee is in possession. It is true that delivery of possession by the donor to the donee is necessary to validate a gift. But it is equally well established that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership to the donee (s. 126). When the mortgagor himself is in possession of the mortgaged property, a gift of the equity of redemption is not valid unless he delivers possession of the property to the donee. But where the mortgagee is in possession, the mortgagor cannot deliver possession to the donee, and the gift, it is submitted, may in that event be completed by some other appropriate method. The Bombay decisions, it is submitted, are not sound. The correctness of these decisions was questioned by the High Court of Allahabad (p), and they have been dissented from by the Calcutta High Court.

A owns six immovable properties. He mortgages three with possession to M. He then makes a gift of all the six properties to D and puts him in possession of the three properties not mortgaged to M. The High Court of Bombay has held that in such a case the gift of all the six properties is valid (q).

**124. Gift of property held adversely to donor.**—A gift of property in the possession of a person who claims it adversely to the donor is not valid, unless the donor obtains and delivers possession thereof to the donee [ill. (a)], or does all that he can to complete the gift so as to put it within the power of the donee to obtain possession [ill. (b)].

[(a) A executes a deed of gift in favour of B, conferring upon him the proprietary right to certain lands then in the possession of Z, and claimed by Z adversely to A. A dies without acquiring possession of the lands. After A's death, B sues Z to recover possession from him. The suit must fail, for the gift was not completed by delivery of possession to B: *Mehera's v. Tajudin* (1888) 13 Bom. 156; *Rahim Bakhsh v. Muhammad Hasan* (1888) 11 All. 1; *Macnaghten*, p. 201, case 6; *Fakir Nynar v. Kandaswamy* (1912) 35 Mad. 120, 128-131, 14 I.C. 993.

(b) A executes a deed of gift of immovable property in favour of B. At the date of the gift the property is in possession of C who claims to hold it adversely to A. B sues C to recover possession of the property from him, joining A in the suit as a party defendant. A by his written statement admits

(n) *Ismal v. Ramji* (1899) 23 Bom. 682; *Mohinudin v. Mancherehah* (1892) 6 Bom. 650.

(o) *Tara Prasanna v. Shandi Bibi* (1922) 49 Cal. 68, 75 I.C. 819, ('22) A.C. 422; *Muhar Bibi v. Maharulla Mondal* (1933) 57 Cal.L.J. 375, 146 I.C. 808, ('38) A.C. 785.

(p) *Rahim Bakhsh v. Muhammad Hasan* (1888) 11 All. 1, 10; *Anwar Baigum v. Nizam-ud-din Shah* (1898) 21 All. 165, 170, 171.

(q) *Chandrasekh v. Gangabai* (1921) 45 Bom. 1296, 64 I.O. 21, ('21) A.B. 248.

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**124-125-A** *B's claim.* C contends that the gift is void, inasmuch as A was out of possession at the date of the gift, and no possession was ever given to B. The gift is valid though no possession was delivered by the donor to the donee. Their Lordships of the Privy Council said: "But it must be observed that in this case the dispute as to the validity of the gift is not between the donee and the donor. \* \* \* The person who disputes it claims adversely to both. The donor has done all that she can to complete the gift and is a party to the suit, and admits the gift to be complete": *Kahdas v. Kanhaya Lal* (1884) 11 Cal. 121, 11 I A 218, 229, a case under the Hindu law, but followed in *Mahomed Buksh v. Hossein Bibi* (1888) 15 Cal. 684, 701-702, 15 I.A. 81 which was a Mahomedan case. In the last mentioned case their Lordships of the Privy Council (at p. 93) said:—

"In this case it appears to their Lordships that the lady [donor] did all she could to perfect the contemplated gift, and that nothing more was required from her. The gift was attended with the utmost publicity, the libanamah itself authorizes the donees to take possession, and it appears that in fact they did take possession. Their Lordships hold, under these circumstances, that there can be no objection to the gift on the ground that Shahzadi [donor] had not possession, and that she herself did not give possession at the time." (r)].

Following the above observations, it has been held that a gift of immovable property by a purchaser at a sale in execution of a decree, though made before confirmation of the sale and before acquisition of possession by him, is valid, if the donee is authorized by the donor to obtain possession (s). See Code of Civil Procedure, 1908, sec. 65.

**125. Writing not necessary.**—Writing is not essential to the validity of a gift either of movable or of immovable property (t).

See 122-129 (Chapter VII) of the Transfer of Property Act, 1882, deal with gifts. By sec. 123 of the Act it is provided that a gift of immovable property must be effected by a registered instrument signed by the donor and attested by at least two witnesses, and that a gift of movable property may be effected either by a registered instrument signed as aforesaid or by delivery. But the provisions of sec. 123 do not apply to Mahomedan gifts (see s 129 of the Act). A gift under the Mahomedan law is to be effected in the manner prescribed by the Mahomedan law (s. 126). If the formalities prescribed by that law (s. 126) are complied with, the gift is valid even though it is not effected by a registered instrument and though, where effected by an instrument, the instrument is not attested (u). But if the formalities are not complied with, the gift is not valid even though it may have been effected in the manner prescribed by sec. 123 of the Transfer of Property Act. See notes to sec. 126.

### **125A. Relinquishment by donor of ownership and dominion.**

It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift (v).

- (r) Followed in *Maqbol Hussain v. Zainul Nua Bibi* (1939) A.L.J. 235, 182 I.O. 742, ('39) A.A. 435.  
(s) *Murza Abid v. Munno Bibi* (1927) 2 Luck. 496, 100 I.O. 72, ('27) A.O. 51.  
(t) In *Kamar-un-nissa Bibi v. Hussaini Bibi* (1890) 3 All. 266, the Privy Council upheld a verbal gift. See also *Baillie*, 509; and *Kulsum Bibi*

- v. Shiam Sunder Lal* (1936) All. L.J. 1027, 164 I.O. 515, ('36) A.A. 600.  
(u) *Karam Haki v. Sharf-ud-Din* (1916) 38 All. 212, 35 I.O. 14; *Abdul Hamid v. M. Abdul Ghani* (1934) 148 I.O. 801, ('34) A.O. 165.  
(v) *Musammatal Bibi v. Sheikh Wahid* (1923) 7 Pat. 118, 114 I.O. 204, ('28) A.P. 188.

Relinquishment of control over the subject gift (w), and book entries in themselves do not constitute (x). ary to complete the gift must amount to delivery of possession.

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"A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must be demonstrated by his entire relinquishment of the thing given, and the gift is null and void when he continues to exercise any act of ownership over it": Macnaghten, p. 51, sec. 8.

**125B. The three essentials of a gift.**—It is essential to the validity of a gift that there should be (1) a declaration of gift by the donor, (2) an acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject of the gift by the donor to the donee as mentioned in sec. 126. If these conditions are complied with, the gift is complete (y).

Baillie, 515; *Hidaya*, 482. This section should be read subject to what is stated in sec. 119

**126. Delivery of possession.**—(1) It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible of (z). As observed by the Judicial Committee, "the taking of possession of the subject-matter of the gift by the donee, either actually or constructively," is necessary to complete a gift (a). See secs. 123, 124, 127 and 128.

(2) *Registration*.—Registration of a deed of gift does not cure the want of delivery of possession.

[A executes a deed of gift of a dwelling house belonging to him in favour of B. The deed is duly registered, but possession of the house is incomplete, and therefore void: *Mogulshah v. Mahmud Saheb* (1887) 11 Bom. 517; *Ismail v. Ramji* (1899) 23 Bom. 119; *Fahazullah v. Bopapati* (1907) 30 Mad. 519.]

(3) If it is proved by oral evidence that a gift was completed as required by law [secs. 125B and 126], it is immaterial that the donor had also executed a deed of gift, but

(w) *Musa Miya v. Kadar Bux* (1928) 55 I.A. 171, 52 Bom. 316, 149 I.C. 31, ('28) A.P.C. 108

(x) *Mahomed Hussain v. Aushabai* (1934) 36 Bom. L.R. 1155, 155 I.O. 334, ('35) A.B. 84.

(y) *Mohammad Abdul Ghani v. Fakhr Jahan Begum* (1922) 49 I.A. 195, 44 All. 301, 98 I.C. 254, ('22) A.P.C. 281; *Amjad Khan v. Ashraf Khan* (1929) 56 I.A. 213, 4 Luck. 305, 116 I.O. 406, ('29) A.P.C. 149; *Sultan Begum v. Ara Begum* (1938) 67 Cal. L.J. 459, 143 I.C. 309, ('38) A.P.C. 164.

(z) *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 221-222, 38 All. 627, 645-646, 36 I.O. 104; *Khajooroo-*

*musa v. Rowshan Jehan* (1876) 2 Cal. 184, 197, 3 I.A. 291, 307; *Okandhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 449, 33 I.A. 68, 76; *Tara Prasanna v. Shandi Bibi* (1922) 49 Cal. 58, 75 I.C. 319, ('22) A.O. 422; *Jamil-un-nissa v. Mohammad Zia* (1937) All. 909, (1937) All. L.J. 486, 170 I.O. 824, ('37) A.A. 547.

(a) *Mohammad v. Fakhr Jahan* (1922) 49 I.A. 195, 209, 44 All. 301, 316, 98 I.O. 254, ('22) A.P.C. 281; *Nazir Durr v. Mahomed Shah* (1926) 161 I.O. 305, ('26) A.L. 92; *Hakimbi v. Rahmatullah* (1941) Nag. 669, 188 I.O. 131, ('40) A.N. 70.

- S. 126** the deed has not been registered as required by the Registration Act, sec. 17 (a) (b).

(4) A declaration in a deed of gift that possession has been given binds the heirs of the donor (c). But such a declaration is not conclusive and a recital in a deed of gift that possession has been given to a minor nephew (without the intervention of a father or guardian—sec. 130) was on the facts held to be insufficient to support a gift as against the heirs of the donor (d).

*Hedaya*, 482; *Bailie*, 520-522

*Constructive possession*.—Where a donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to *constructive possession* of the property on the part of the donee and the gift is completed by such possession (e).

*Mutation of names*.—No mutation of names is necessary to complete the transfer of possession in the case of a gift (f). Nor is mutation of names a valid substitute for delivery of possession (g).

*Burden of proof*.—"By the Muhammadan law a holder of property may in his lifetime give away the whole or part of his property if he complies with certain forms, but it is incumbent upon those who seek to set up such a transaction to show very clearly that those forms have been complied with. It may be by deed of gift simply [that is *hiba*], or by deed of gift coupled with consideration [That is, *hiba-bil-uwaz*, as to which see sec. 141] If the former, unless accompanied by delivery of the thing given, so far as it is capable of delivery, it is invalid. If the latter (in which case delivery of possession is not necessary), actual payment of the consideration must be proved, and the *bona fide* intention of the donor to divest himself in *presente* of the property, and to confer it upon the donee, must also be proved" (h).

*Subsequent delivery of possession*.—A gift is not complete unless possession is taken at the time of gift, that is at the time of declaration and acceptance (i). Possession taken at a subsequent date is sufficient if it was taken with the donor's consent (j).

(b) *Nasib Ali v. Wajed Ali* (1926) 44 Cal. L.J. 490, 100 I.C. 296, ('27) A.C. 197, *Abdul Rahman v. Gaya Prasad* (1930) 5 Luck. 384, 124 I.C. 351, ('29) A.O. 435.

(c) *Muhammad Muntaz v. Zubaida Jan* (1889) 16 I.A. 205, *Jam-d-un-nisa v. Muhammad Zin* (1937) All. 609, (1937) All L.J. 486, 170 I.O. 824, ('37) A.A. 547; See *Nurbai v. Akhram Mahomed* (1939) 11 Bom. L.R. 825, ('39) A.E. 449 which seems to have been decided on its facts.

(d) *Jhummam v. Husain* (1931) 129 I.C. 161, ('31) A.O. 7.

(e) *Mohammad v. Fakhr Jahan* (1922) 40 I.A. 195, 210, 44 All. 301, 818, 68 I.C. 254, ('22) A.P.C. 281.

(f) *Muhammad Muntaz v. Zubaida Jan* (1889) 16 I.A. 205, 217; *Mohammad Sadiq v. Fakhr Jahan* (1922)

59 I.A. 1, 13, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13.

(g) *Mohammad Azim v. Saadat Ali* ('31) A.O. 177, 136 I.C. 642.

(h) *Okudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 439, 448-449, 38 I.A. 68, 75-76; *Khajooroonnisa v. Rooshan Jahan* (1876) 3 I.A. 291, 307, 2 Cal. 184, 197; *Sadiq Husain v. Hashim Ali* (1916) 43 I.A. 212, 221, 38 All. 627, 645-646, 36 I.C. 104; *Gulam Jafar v. Mastudin* (1881) 5 Bom. 238, 242.

(i) See (1918) 48 I.A. 212, 222-223, 38 All. 627, 646-647, 36 I.C. 104, *infra*; *Mulani v. Maula Baksh* (1924) 46 All. 260, 262-263, 78 I.C. 222, ('24) A.A. 307.

(j) *Macnaghten*, p. 50, s. 4, and case 14, p. 215; *Jhummam v. Husain* ('31) A.O. 7, 129 I.C. 161.

**126A. Gift through the medium of trust.**—(1) A gift may be made through the medium of a trust. The same conditions are necessary for the validity of such a gift as those for a gift to the donee direct with this difference that the gift should be accepted by the trustees [sec. 125B], and possession also should be delivered to the trustees (k) [sec. 126].

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(2) A Mahomedan cannot through the medium of a trust settle property for the benefit of persons who are incapable of taking under a gift, nor can he through the medium of a trust create an estate not recognized by the law of gifts governing the sect to which he belongs. Thus neither a Sunni nor a Shia can make a gift in favour of an unborn person; so he cannot through the medium of a trust settle property in favour of an unborn person. Sunni law recognizes the creation of a life-estate (sec. 44), and so presumably a life-estate can be created through the medium of a trust; though not a vested remainder. But the Shia law recognizes life-estates and vested remainders. A Shia may therefore create such estates through the medium of a trust, but not in favour of unborn persons. Successive life-interests, however, may be created both under the Sunni and the Shia law in favour even of unborn persons by means of a wakf.

[A, a Shia Mahomedan, executes a deed purporting to transfer certain immovable properties to B, C and D as trustees for the benefit of his wife and children. The deed is executed by A and it is registered. It is not executed by B, C and D or any of them. None of the properties is transferred to the names of the trustees, and A continues to be in receipt and enjoyment of the rents as before. Here there is no acceptance of the trust by the trustees, nor is there any delivery of possession to the trustees. The gift is therefore void. *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104.]

The introduction of trustees is merely the employment of machinery whereby the gift is carried into effect (l). Acceptance of a trust by trustees is indicated by their executing the deed of trust. In the case put above, the deed was not executed by the trustees, and hence there was no acceptance.

As in the case of a gift to the donee direct, so in the case of a gift through the medium of a trustee, the donor should divest himself of all control over the corpus of the property. If he does not do so, the gift is invalid (m).

(k) *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 218-224, 38 All. 627, 642-648, 36 I.C. 104; *Moosabhai v. Yacobbhak* (1904) 29 Bom. 267, 274-276 [a Khoja case]; *Jamnas v. Sethna* (1910) 34 Bom. 604, 6 I.C. 513; *Cusamally v. Currimbhoy* (1911) 36 Bom. 214, 259-260, 12 I.C. 225 [a Khoja case]; *Ram Charan v. Fatima Begum* (1915) 42 Cal. 938, 988, 30 I.C. 686 (a case of wakf); *Mirza Hashim v. Bindanem* (1928) 6 Rang. 343, 113 I.

O. 255, ('28) A.R. 323; *Suwasbi v. Mahomedali* (1934) 36 Bom. L.R. 1151, 154 I.C. 984, ('35) A.B. 34.

(l) *Ram Charan v. Fatima Begum* (1915) 42 Cal. 933, 938, 30 I.C. 686.

(m) *Mirza Hashim v. Bindanem* (1928) 6 Rang. 343, 113 I.C. 255, ('28) A.R. 323 [where the condition that the trustees should not sell the property without the consent of the donor was held to render the gift invalid].



**S. 127**      **127. Delivery of possession of immovable property.—(1)**  
*Where donor is in possession.*—A gift of immovable property of which the donor is in actual possession is not complete, unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession (n).

(2) *Where property is in the occupation of tenants.*—A gift of immovable property which is in the occupation of tenants may be completed by a request by the donor to the tenants to attorn to the donee (o), or by delivery of the title deed or by mutation in the Revenue Register or the landlord's sherista (n).

(3) *Where donor and donee both reside in the property.*—No physical departure or formal entry is necessary in the case of a gift of immovable property in which the donor and the donee are both residing at the time of the gift. In such a case the gift may be completed by some overt act by the donor indicating a clear intention on his part to transfer possession and to divest himself of all control over the subject of the gift (q). The principle for the determination of questions of this nature was thus stated by West, J., in a Bombay case (r): "When a person is present on the premises proposed to be delivered to him, a declaration of the person previously possessed puts him into possession . . . without any physical departure or formal entry".

#### *Illustrations to Sub-section (3)*

(1) A Mahomedan lady, who had brought up her nephew as her son, executed a deed of gift in favour of the nephew of a house in which they were both residing at the time of the gift. The donor did not physically depart from the house either at the time of the gift or at any subsequent period, but continued to live in the house with her nephew. The property was transferred to the name of the nephew, and the rents were recovered in his name. *Held*

(n) Macnaghten, p. 231, *Prece* XXII

(o) *Shaik Ibrahim v. Shaik Suleman* (1884)

9 Bom. 146, 150; *Bibi Khaver v.*

*Bibi Rukha* (1905) 29 Bom. 408

471; *Khajooroonissa v. Rowshan Je-*

*lan* (1876) 2 Cal. 184, 197, 3 I.A.

291, 308; *Ahah Rakha v. Ah Mahom-*

*mad* (1928) 9 Lah. 567, 108 I.C. 711,

(29) A.L. 45; *Khair Mahomed Us*

*v. Bacha* (1940) Kar. 319 (attorn-

ment not proved)

(p) *Gani Ma v. Wajid Ali* (1935) 39 Cal.

W.N. 882, 61 Cal.L.J. 328, 156 I.C.

563, (75) A.C. 898. (A full treat-

ment of the subject by Mitter, J.)

(q) *Shaik Ibrahim v. Shaik Suleman* (1884)

9 Bom. 146; *Abdul Majid Khan v.*

*Hussainbu* (1920) 22 Bom. L.R.

229, 55 I.C. 952; *Humera Bibi v.*

*Najm-un-nissa* (1905) 28 All. 147

[sent to nephew]; *Bibi Khaver v.*

*Bibi Rukha* (1905) 29 Bom. 408

[gift to daughter-in-law and her

children]; *Kandath v. Musalim*

(1907) 30 Mad. 305 [mother to

daughter]; *Jamil-un-nissa v. Moham-*

*mad Zia* (1937) All. 609, (1937)

All. L.J. 486, 170 I.C. 824,

(37) A.A. 547; *Mt. Kamsan v.*

*Mt. Latifan* (1939) 183 I.C. 71,

(39) A.P. 818, *Mt. Nawrozi v.*

*Najat Ali Shah* (1939) 184 I.C.

508, (39) A.P. 321.

(r) (1884) 9 Bom. 146, 150, *supra*.

that the gift was complete, though there was no formal delivery of possession: *Humera Bibi v. Najm-un-nissa* (1905) 28 All. 147.

(2) A Mahomedan lady executed a deed of gift in favour of her son of a house in which she and her son were both living. The son continued to live with her in the house after the execution of the deed. The deed recited that possession was given to the son and the son paid Municipal taxes after the execution of the deed. Held that the gift was complete although there was no physical departure or formal entry: *Abdul Razak v. Zainab Bi* (1933) 63 Mad.L.J. 887, 141 I.C. 843, ('33) A.M. 86.

(3) A Mahomedan lady executed a deed of gift in favour of her nephew of a house in which they both resided. The nephew continued to live with her in the house after the execution of the deed. The deed contained no recital that possession was given. The deed was not delivered to the nephew and the lady paid Municipal taxes after execution of the deed. Held that the gift was invalid and ineffective: *Qamar-ul-din v. Mt. Hassan Jan* (1935) 16 Lah. 629, 159 I.C. 968, ('35) A.L. 785.

(4) A Mahomedan whose daughter-in-law is living in his house declares in unequivocal language that he has divested himself of the ownership of half the house and authorizes the daughter-in-law to take possession of that half. The daughter-in-law continues to reside in that half as before. Held that the gift was complete although there was no mutation of names in the Municipal Register: *Baldeo Prasad Balgovind v. Shubratn* (1936) All L.J. 590, 164 I.C. 720.

**127A. Gift of immovable property by husband to wife.**—The rule laid down in sec. 127 (3) applies to gifts of immovable property by a wife to the husband (s), and by a husband to the wife, whether the property is used by them for their joint residence (t), or is let out to tenants (u). The fact that the husband continues to live in the house or to receive the rents after the date of the gift will not invalidate the gift, the presumption in such a case being that the rents are collected by the husband on behalf of the wife and not on his own account (v).

*Gift from husband to wife.*—In *Amina Bibi v. Khatija Bibi* (w), the gift was from a husband to the wife, and the gift consisted of a house in which the husband and wife lived together, and of a chawl (adjoining the house) which was let out to tenants. Sir M. Sasse, C.J., said: "In my opinion, the relation of husband and wife and his legal right to reside with her and to manage her property rebut the inference which in the case of parties standing in a different relation would arise from a continued residence in the house after the making of the *hiba* (gift), and in the husband generally receiving the rents of the chawl annexed to that house." In *Ma Mi v. Kallender Ammal* (x), the gift was by a husband to the wife, and mutation of names was duly effected in public records and the wife's name was entered as pro-

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(e) Macnaghten, p. 51, s. 9.

(f) *Amina Bibi v. Khatija Bibi* (1864) 1 Bom. H.C. 167; *Azim-un-nissa v. Dale* (1868) 6 Mad. H.C. 465.

(g) *Emnabai v. Hajirabai* (1888) 13 Bom. 352.

(v) *Ma Mi v. Kallender Ammal* (1927) 54 I.A. 23, 5 Rang. 7, 100 I.C. 32, ('27) A.P.C. 22, approving (1864)

1 Bom. H.C. 157, 162, *supra*; *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 885, ('32) A.P.C. 18; (1888) 13 Bom. 352, 354-355, *supra*.

(w) (1864) 1 Bom. H.C. 157, 162, *supra*.  
(x) (1927) 54 I.A. 23, 30, 5 Rang. 7, 100 I.C. 32, ('27) A.P.C. 22.

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priestess. Dealing with this case their Lordships of the Privy Council said: "It must therefore be taken that mutation was effected by Moideen [husband] himself, and in the case of a gift of immovable property by a Mahomedan husband to his wife, once mutation of names has been proved, the natural presumption arising from the relation of husband and wife existing between them is that the husband's subsequent acts with reference to the property were done on his wife's behalf and not on his own." But no mutation of names is necessary if the deed of gift declares that the husband delivered possession to the wife, and the deed is handed over to her and retained by her (y).

**128. Delivery of possession in case of incorporeal property and actionable claims.**—When the subject of the gift is incorporeal property or an actionable claim, the gift may be completed by any act on the part of the donor showing a clear intention on his part to divest himself *in presenti* of the property, and to confer it upon the donee.

[(a) A gift of Government promissory notes may be completed by endorsement and delivery to the donee: *Nawab Umjad Ally Khan v. Mohumdee Begum* (1867) 11 M.I.A. 517, 544.

(b) A gift of zamindari rights, held under Government, may be completed by mutation of names in the books of the Collector: *Sajjad Ahmad Khan v. Kadri Begam* (1895) 18 All. 1

(c) A hands over to his wife a receipt passed to him by a bank in respect of money deposited by him with the bank, and says "after taking a bath I will go to the bank and transfer the papers to your name." The receipt contains in the margin the words "not transferable." A dies before the transfer is effected. The gift is not complete: *Aga Mahomed Jaffer v. Koolson Beeber* (1897) 25 Cal. 9, 17. The receipt being "not transferable," the donor's right to receive the money from the bank cannot be transferred by a mere delivery of the receipt.]

As regards delivery of possession, a distinction ought to be made between cases where, from the nature of the subject of the gift, actual possession cannot be given to the donee and cases where such possession can be given to the donee. Thus where lands are let on leases, no *khas* or actual possession can be delivered. In such a case a gift of the lands is valid though possession is not delivered (x). "There is no doubt that the principle of Mahomedan law is that possession is necessary to make a good gift, but the question is, possession of what? If a donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our judgment, nothing in the Mahomedan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such right as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers what he himself does not possess, namely, the corpus of the property. He must evidence the reality of the gift by divesting himself so far as he can, of the whole of what he gives" (a).

(y) *Mohammad Sadig v. Fakhr Jahan* (1932) 59 I.A. 1, 13, 6 Luck. 556, 136 I.O. 385, (32) A. P.C. 13.  
(z) *Mullick Abdool Gaffoor v. Muleka*

(1884) 10 Cal. 1112.  
(a) *Anwarul Begam v. Nizam-ud-din Shah* (1898) 21 All. 165, 170-171.

**129. Gift to a minor by father or other guardian.**—No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is necessary is to establish a bona fide intention to give (b). Ch. XI, Ss. 129, 130

*Hedaya*, 484; *Bailie*, 538; *Macnaghten*, p. 51, sec. 9. "Where there is on the part of a father or other guardian a real and bona fide intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor;" *Ameerunnissa v. Abadoonnissa* (1875) 15 Beng. L.R. 67, 78, L.R. 2 I.A. 87, 104.

This section will not apply, and it is necessary to transfer possession, if there are other donees besides the minor child, e.g., a trust for the benefit of a minor daughter and her adult husband: *Suarabai v. Mahomedali* (1934) 36 Bom. L.R. 1151, 154 I.C. 984, ('35) A.B. 34.

The guardian referred to in this section is the guardian of the property of a minor. The following persons are entitled in order to the guardianship of the property of a minor, namely, (1) the father, (2) his executor, (3) the father's father and (4) his executor. No change of possession is necessary in the case of a gift by a father to his minor son for the father himself is the person to receive possession as the guardian of his son. Similarly no change of possession is necessary in the case of a gift by a grandfather to his minor grandson if the father is dead, for the grandfather is then the person to take delivery on behalf of his grandson as his guardian. But if the father is alive and has not been deprived of his rights and powers as guardian, there must be a delivery of possession by the grandfather to the father as guardian of his minor sons, otherwise the gift is not complete. The mere fact that the minors have always lived with their grandfather and have been brought up and maintained by him will not constitute him guardian of their property so as to dispense with delivery of possession (c).

The mother is not in law the guardian of the property of her infant child; therefore, a gift by a mother to her infant child does require transfer of possession from her to the child's father, and, if the father be dead, to his executor, and if there be no executor, to the child's father's father, and if he be dead, to his executor. But if there be none of these, no change of possession is necessary in the case of a gift by a mother to her infant child, or in the case of a gift by any other person to a minor under his care (see. 130).

**130. Gift to a minor by a person other than his father or guardian.**—A gift to a minor or to a lunatic by a person other than his father or guardian may be completed by delivery of possession to the father or guardian (d).

"When the donee is a minor, or insane, the right to take possession for him belongs to his guardian, who is, first his father, then his father's executor,

(b) *Ameerunnissa v. Abadoonnissa* (1875) 15 Beng. L.R. 67, 78, 2 I.A. 87, 104; *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.P.C. 13 [bona fide intention proved]; *Sultan Miya v. Ajibkhatun Bibi* (1932) 59 Cal. 557, 138 I.C. 733, ('32) A.C. 497 [bona fide intention not proved]; *Fatima Bibi v. Ahmad Baksh* (1904) 81 Cal. 319, 330; *Khalq Buz v. Mahabub Prasad* (1931) 6 Luck.

403, 129 I.C. 335, ('31) A.O. 19; *Mohammad Hassan v. Sajdar Mirza* (1933) 14 Lah. 473, 144 I.C. 45, ('33) A.L. 601.  
(c) *Musa Miya v. Kadar Buz* (1928) 55 I.A. 171, 52 Bom. 316, 109 I.C. 31, ('28) A.P.C. 108.  
(d) *Musa Miya v. Kadar Buz*, *supra*; *Jhumsan v. Husan* ('31) A.O. 7, 129 I.C. 161 [gift by maternal uncle—no possession delivered—gift held invalid].

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then his grandfather, then his executor." If there be none of these, possession may be taken for the minor by any person under whose power he may happen to be (s. 262 B) Baillie, 539; *Hedaya*, 484; Macnaghten, p. 51, see ¶10. The mother is not the legal guardian and therefore possession given to the mother is ineffectual (c). Of course, no change of possession is necessary where the guardian himself is the donor (s. 129). See notes to s. 129.

**131. Gift to a bailee.**—Where the subject of the gift is already in the possession of the donee as bailee, the gift may be completed by declaration and acceptance, without formal delivery of possession.

(a) A gift of property in the possession of a bailee, lessee, pledgee, or mortgagee may be completed without formal transfer of possession. *Hedaya*, 464; Baillie, 522.

(b) A makes a gift of a house to a servant in his employ for the collection of rents. There is no evidence of any "overt act showing transfer of possession of the property." The gift is void, for a servant or an agent for the collection of rents cannot be said to be in "possession" of the house of which he collects the rents: *Valayat Hossein v. Manran* (1879) 5 C L R 911.

**132. Mushaa defined.**—Mushaa is an *undivided* share in property either movable or immovable.

**133. Gift of mushaa where property indivisible.**—A valid gift may be made of an undivided share [mushaa] in property which is *not capable* of partition.

[A, who owns a house, makes a gift to B of the house and of the right to use a staircase used by him jointly with the owner of an adjoining house. The gift of A's undivided share in the staircase, though it is a gift of a mushaa, is valid, for a staircase is *not capable* of division: *Kasim Husain v. Sharif-un-Nissa* (1883) 5 All. 285. A gift of a share in the business of a Turkish bath is valid, for the *Hammam* is not capable of division and would be ruined if it were divided by metes and bounds: *Fayyaz-ud-din v. Kutab-ud-din* (1929) 10 Lah. 761, 116 I.C. 899, (1929) A L J 309. A gift of an undivided share of the banks of a tank is valid if the banks are regarded as indivisible: *Ala Baksa v. Mahabat Ali* (1935) 61 Cal.L.J. 209, 159 I.C. 678, (1935) A C 739.]

**134. Gift of mushaa where property divisible.**—A gift of an undivided share (mushaa) in property which is *capable of division* is irregular (*fasid*), but not void (*batil*). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated [ill. (a)].

*Exceptions.*—A gift of an undivided share (mushaa), though it be a share in property *capable of division*, is valid

(c) *Suna Meah v. S. A. S. Pullai* (1933) 11 Rang. 109, 143 I.C. 823, (1933)

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from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:— **Ch. XI, S. 134**

- (1) where the gift is made by one co-heir to another [ill. (b)];
- (2) where the gift is of a share in a zemindari or taluka [ill. (c)];
- (3) where the gift is of a share in freehold property in a large commercial town [ill. (d)];
- (4) where the gift is of shares in a land company (f).

[(a) *A* makes a gift of her undivided share in certain lands to *B*. The share is not divided off at the time of gift, but it is subsequently separated and possession thereof is delivered to *B*. The gift, though irregular in its inception, is validated by subsequent delivery of possession: *Muhammad Muntaz v. Zubaida Jan* (1889) 11 All. 460, 16 I.A. 205; *Mahomed v. Cooverbar* (1904) 6 Bom.L.R. 1043; *Mohib Ullah v. Abdul Khalek* (1908) 30 All. 250; *Abdul Aziz v. Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635; *Mofazzudin Talafdar v. Aheri Ali Sheikh* (1936) 62 Cal.L.J. 434

A gift of an undivided share of the banks of a tank if regarded as property capable of division is validated by admission of the donee to possession: *Ala Baksa v. Mahabat Ali* (1935) 61 Cal.L.J. 209, 159 I.C. 678, ('35) A.C. 739.

(b) A Mahomedan female dies leaving a mother, a son and a daughter as her only heirs. The mother may make a valid gift of her undivided share in the inheritance to the son, or to the daughter, or jointly to the son and daughter: *Mahomed Buksh v. Hoossein Bibi* (1888) 15 Cal. 684, 701, 15 I.A. 81.

(c) *A*, *B* and *C* are co-sharers in a certain zemindari. Each share is separately assessed by the Government, and has a separate number in the Collector's books, and the proprietor of each share is entitled to collect a definite share of rents from the ryots. *A* makes a gift of his share to *Z* without a partition of the zemindari. The gift is valid, for it is not a gift strictly of a mushan, the share being definite and marked off from the rest of the property: *Ameroonnissa v. Aboftoonnissa* (1875) 15 B.L.R. 67, 2 I.A. 87; *Abdul Aziz v. Fateh Mahomed* (1911) 38 Cal. 518, 9 I.C. 635; *Jwan v. Imtiaz* (1878) 2 All. 93; *Kasim v. Sharif-un-Nissa* (1883) 5 All. 285; *Zakuran v. Abdus Salam* (1930) 5 Luck. 597, 123 I.C. 857, ('30) A.O. 71, ('37) A.C. 500; *Jahan Ali Khan v. Nasrannessa Bibi* (1937) 65 Cal.L.J. 34

(d) *A*, who owns a house in Rangoon, makes a gift of a third of the house to *B*. The gift is valid, the property being situated in a large commercial town: *Ibrahim Goolam Arif v. Saudoo* (1907) 35 Cal. 1, 34 I.A. 167.

(e) *A*, a partner in a firm, makes a gift of his share of the partnership assets to *B*. The gift is not valid unless the share is divided off and handed over to *B*: *Hedaya* 483, Baillie, 529-530.]

*Hedaya*, 483-484; Baillie, 523-530. "A gift of part of a thing which is capable of division is not valid unless the said part is divided off and separated from the property of the donor; but a gift of part of an indivisible thing is valid," the reason being that the thing being indivisible, "a complete seisin is altogether impracticable, and hence an incomplete seisin must necessarily suffice, since this is all that the article admits of"; *Hedaya*, 483.

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(f) *Ibrahim Goolam Arif v. Saudoo* (1907) 35 Cal. 1, 34 I.A. 167.

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The term "mushaa" is derived from *shuyun*, which signifies confusion. An undivided share is called mushaa, because of the confusion that is likely to arise in the enjoyment of the property if a gift were made of an undivided share in the property by one co-sharer to a stranger. No such confusion can arise, if the gift is by one co-sharer to another co-sharer. The result is that a gift by one of several heirs of his undivided share in property which is capable of division to a stranger is irregular, but a gift of such a share in favour of a co-heir is valid.

*Doctrine of mushaa unadapted to a progressive state of society.*—In *Muhammad Mumtaz v Zubaida Jan*, (1889) 11 All. 460, 16 I.A. 205, 215, upon which illustration (a) is based, their Lordships of the Privy Council said: "The doctrine relating to the invalidity of gifts of mushaa is wholly unadapted to a progressive state of society, and ought to be confined within the strictest rules." This principle was applied by their Lordships of the Privy Council in the case cited in ill. (d). It was also applied by the Allahabad High Court in a case where a sister made a gift to her husband of her share in six houses and three fields by a registered deed of gift. The property was divisible, but the gift was held to be valid as the donor who had only constructive possession had done all she could to put the donee in possession (g). In *Ala Baksh v. Mahabat Ali* (h) the same principle was applied. It was considered that the gift of an undivided share is valid in anything which can be used to better advantage in an undivided condition.

*Doctrine of mushaa in Madras.*—In a Madras case (i), Benson, J., observed that the doctrine of mushaa did not apply in the Madras Presidency, but it was held in a later case that that view was erroneous (j).

*Doctrine of mushaa does not apply to transfers for consideration.*—The rule laid down in this section applies only to gifts; it does not apply to transfers for consideration (k).

*Devise to get over doctrine of mushaa.*—It has been held by the High Court of Allahabad that though a valid gift cannot be made of an undivided share (mushaa) in property which is capable of division, the difficulty may be overcome by the donor selling the undivided share at a fixed price to the person to whom the gift is intended to be made, and then releasing that person from payment of the debt representing the price (l). If this decision were correct, delivery of possession in the case of a gift could be dispensed with in every case by the donor making a pretence of a sale to the donee and afterwards releasing the donee from the obligation to pay the price.

*Shia law.*—A gift of an undivided share is valid, though it be a share in property capable of partition (m): Baillie, II, 204.

**135. Gift to two or more donees.**—A gift of property which is capable of division to two or more persons without dividing it is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him. This rule does not apply to the case

(g) *Hamid Ullah v Ahmed Ullah* (1936) All. L.J. 292, 163 I.C. 558, ('36) A.A. 473.

(h) (1935) 61 Cal. L.J. 209, 159 I.C. 678, ('35) A.C. 739; *Jahar Ali Khan v Nasirameena* (1937) 65 Cal. L.J. 34, ('37) A.C. 500, citing *Fayyaz-ud-din Kutub-ud-din* (1929) 10 Lah. 761, 116 I.C. 899, ('29) A.L. 309.

(i) *Alabi Koya v. Mussa Koya* (1901) 24

Mad. 513.

(j) *Yahnuddin v Boyapati* (1907) 80 Mad. 519.

(k) *Ashdhai v. Abdulla* (1906) 31 Bom. 271.

(l) *Ahmadi Begam v. Abdul Aziz* (1927) 49 All. 503, 100 I.C. 644, ('27) A. A. 345.

(m) *Sadik Hussain v Hashim Ali* (1918) 43 I.A. 212, 221-222, 38 All. 627, 646, 36 I.C. 104.

mentioned in the third Exception to sec. 134 (*n*), nor, it is conceived, to the cases mentioned in the other Exceptions.

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[*A* makes a gift of a house to *B* and *C* without making any division of the property at the time of gift. Subsequently *B* and *C* divide the property and each takes possession of the portion allotted to him with the consent of the donor. Is the gift valid? According to Macnaghten [p. 50, s. 7, p. 201, case 5], it is not, the reason given being that the division should have taken place simultaneously with the transfer. According to Baillie (p. 524), the gift is not void in its inception and it may be rendered valid by subsequent division between the donees. The latter seems to be the better opinion. See also *Hedaya*, p. 485. The Bombay High Court has held that the rule is obsolete and that a gift can be made to two donees although they are to hold the property as tenants in common (*o*).]

**Shia law.**—Under the Shia law a gift of property to two or more donees is valid, though no division is made either at the time of gift or subsequently: Baillie, II, 205.

**136. Gift in futuro.**—A gift cannot be made of anything to be performed *in futuro* [ills. (a) and (b)], nor can it be made to take effect at any future period whether definite [ill. (c)] or indefinite (*p*).

[*(a)* *A* makes a gift to *B* of "the fruit that may be produced by his palm tree this year." The gift is void as being a gift of future property: Baillie, 516

[*(b)* A Mahomedan executes a deed in favour of his wife purporting to give to the wife and her heirs in perpetuity Rs. 4,000 every year out of his share of the income of certain Jaghir villages. The gift is void, as being a gift of a portion of the future revenue of the villages: *Amul Nissa v. Mir Nurudin* (1896) 22 Bom. 489.

[*(c)* *A* executes a deed of gift in favour of *B*, containing the words "so long as I live, I shall enjoy and possess the properties, and I shall not sell or make gift to anyone, but after my death, you will be the owner." The gift is void, for it is not accompanied by delivery of possession and it is not to operate until after the death of *A*: *Yusuf Ali v. Collector of Tipperah* (1882) 9 Cal. 138. See also *Chekkonekutti v. Ahmed* (1886) 10 Mad. 196, at p. 199

[*(d)* *A* is entitled to receive a specified share in the offerings made by pilgrims at a certain shrine. *A* may make a valid gift of the right to receive such share. Here the thing gifted is "the right of the donor to receive a fixed share in the offerings after they have been made" (see s. 122): *Ahmad-ud-Din v. Ilaqi Baksh* (1912) 34 All. 465, 14 I.C. 587; *Anwar Begam v. Nizam-ud-din Shah* (1898) 21 All. 165, at pp. 170-171.]

Macnaghten, p. 50, secs. 3 and 5; Baillie, 516. The rule set forth in this section is based on the principle that the object of the gift must be in existence at the time of the gift: Baillie, 516.

**137. Contingent gift.**—A gift cannot be made to take effect on the happening of a contingency (*q*).

(n) *Ibrahim Goolam Ariff v. Saiboo* (1908) 85 Cal. 1, 34 I.A. 167.  
(o) *Ebrahim Alibhai v. Bai Asi* (1933) 55 Bom. 254, 35 Bom.L.R. 1148, 149 I.C. 225, ('34) A.B. 21; see *Karim Ali v. Ratna Manikka Mudaliar* (1939) M.W.N. 409, ('38) A.M. 677.

(p) *Chekkonekutti v. Ahmed* (1887) 10 Mad. 196, 199; *Phul Bee Bee v. E.M.P. Chettyar Firm* (1935) 18 Rang. 679, 156 I.C. 1038.  
(q) Macnaghten, p. 50, sec. 3; Baillie, 516-517; *Abdul Karim v. Abdul Qayyum* (1906) 23 All. 342, 345.



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"A gift must not be dependent on anything contingent, as the entrance of Zeyd, or the arrival of Khalid": Baillie, 515-516, 549-550. A gift by a Shia Mahomedan to A for life, and, in the event of the death of A without leaving male issue, to B, is as regards B a contingent, gift, and therefore void (r). In a Privy Council case a gift was made by a Shia Mahomedan to his wife for life, and after her death to such of his children as may be living at his death. Their Lordships observed that the gift to the children was contingent, but they refrained from expressing any opinion as to its validity (s). As to alternative bequests, see sec. 108D.

**138. Gift with a condition.**—When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void, and the gift will take effect as if no condition were attached to it (t).

"All our masters are agreed that when one has made a gift and stipulated for a condition that is *fasid* or invalid, the gift is valid and the condition is void": Baillie, 546.

*Gift of a life-estate.*—Life estates were considered to come under this principle with the result that the donee took an absolute interest. But in *Amjad Khan's* case (u) the Judicial Committee did not regard the principle as applicable to the facts. See sec. 44 and the cases there cited. "An *amree* (life grant) is nothing but a gift and a condition; and the condition is invalid, but the gift is not rendered null by involving an invalid condition": *Hedaya*, 489.

#### Illustrations.

[(a) If a Sunni Mahomedan says, "this mansion is to thee *oomree* (for thy life), and when thou art dead it reverts to me," the gift is lawful, and the condition is void. Baillie, 517; *Hedaya*, 489.

The result is that the donee takes an absolute interest in the mansion, and not only a life-interest. This is the *legal effect* of the gift. Similarly, if a house is given to A for life, and after his death to B, the legal effect of the gift is that A takes the house absolutely, and B takes nothing. The same rule applies to a testamentary gift (v). But if the gift is not of an absolute interest with a condition of defeasance but of a limited interest it would appear to be valid. This is the effect of the decision of the Privy Council in *Amjad Khan's* case so that a gift of a life estate is valid in Sunni law. See sec. 44 (1).

(b) A makes a gift of Government promissory notes to B, on condition that B should return a fourth part of the notes to A after a month. The condition is void and B takes an absolute interest in the notes: see Baillie, 547; *Hedaya*, 488. (Here the condition relates to the return of part of the corpus.)

(c) A makes a gift of a house to B on condition that he shall not sell it, or that he shall sell it to a particular individual, or that B shall give some part of it in *waz* or exchange. The condition is void, and B takes an absolute interest in the house: Baillie, 547. See sec. 139.

- (r) *Cosamally v. Currimbhoy* (1911) 36 Bom. 214, 257-258, 12 I.C. 225.  
(s) *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 219-221; 38 All. 627, 643-644, 36 I.C. 104.  
(t) *Nizamudin v. Abdul Gafar* (1888) 13 Bom. 264, 275 affirmed on appeal to P.C. subnomine *Abdul Gafar v. Nizamudin* (1892) 17 Bom. 1, 5, 19 I.A. 170, 172 (as to the last decision, see *Mahomed Ibrahim v. Abdul Latif* (1913) 37 Bom. 447, 458, 17 I.C. 689; *Suleman v.*

- Dorab Ali* (1881) 8 I.A. 117, 122; *Abdoola v. Mahomed* (1905) 7 Bom. L.R. 306. *Mahomed Shah v. Official Trustees of Bengal* (1909) 36 Cal. 431, 2 I.C. 292; *Mo. Hayan v. R.L.S.A.R.S. Chettyar* (1935) 158 I.O. 848, ('35) A.R. 318.  
(u) (1929) 56 I.A. 213, 4 Luck. 305, 116 I.O. 405, ('29) A.P.O. 149.  
(v) *Abdul Kerim v. Abdul Qayum* (1906) 28 All. 342; *Mo. Hayan v. F.L.S.A.R.S. Chettyar* (1935) 158 I.O. 848, ('35) A.R. 318.

*Restraint against alienation.*—In the case of a gift, a restraint against alienation, whether absolute or partial, is void. In the case of a transfer for a consideration, it is valid if the restraint is partial, as where it is provided that the transferee shall not sell the property to any one but the members of the transferor's and transferee's family (w), but void if the restraint is absolute. See Transfer of Property Act, sec. 10.

(d) *A* makes a gift of certain property to *B*. It is provided by the deed of gift that *B* shall not transfer the property. The restraint against alienation is void, and *B* takes the property absolutely: *Babu Lal v. Ghansham Das* (1922) 44 All. 633, 70 I.C. 84, ('22) A.A. 205.]

*Life-grant under Shafei law.*—A gift for life is recognized among Shafeis, a subset of Sunnis (x).

*Life-grant under Shia law.*—The Shia law recognizes a gift of a life estate (y). Thus it is stated in Baillie, II, 226, that if a man says, "I have bestowed on thee this mansion for thy life or my life," it is a valid gift. In *Nisan Ali Khan v. Mahomed Ali Khan* (z) the Privy Council construed a Shia will as creating a succession of life estates but did not have to consider the validity of the second and third life interests.

**139. Condition in the nature of a trust.**—Where property is transferred by way of gift, and the donor does not reserve dominion over the *corpus* of the property nor any share of dominion over the *corpus*, but stipulates simply for and obtains a right to the *recurring income* during his life, the gift and the stipulation are both valid. Such a stipulation is not void, as it does not provide for a return of any part of the *corpus* as in sec. 138 ill. (b) and (c). The stipulation may also be enforced as an agreement raising a trust and constituting a valid obligation to make a return of the proceeds during the time stipulated. It was so held by the Privy Council in *Nawab Umjad Ally v. Mohumdee Begum* (a) [ill. (a)] which was a Shia case and in *Mohammad v. Fakhr Jahan* (b) which was a Sunni case.

The principle of the above decision has been extended by the Courts in India to cases where a gift is made subject to the condition that the donee shall pay the income to a person or persons nominated by the donor during the life of such person or persons [ills. (b) and (c)].

- (w) *Muhammad Raza v. Abbas Banda Bibi* (1932) 59 I.A. 236, 7 Luck. 257, 86 C.W.N. 774, 137 I.O. 321, ('32) A. P.C. 158.  
(z) *Mahomed Ibrahim v. Abdul Latif* (1913) 37 Bom. 447, 458, 17 I.C. 689.  
(y) *Banoo Begum v. Mir Abed Ali* (1908) 32 Bom. 172; *Siraj Husain v. Mustaf Husain* (1921) O.C. 321, 49 I.O. 58.  
(x) (1932) 59 I.A. 268, 7 Luck. 324, 34 Bom. L.B. 1299, 137 I.C. 539, ('32) A. P.C. 172.  
(a) (1867) 11 M.I.A. 517, 547-548; *Mir-*

- za Hashim v. Bindaneem* (1928) 6 Rang. 343, 113 I.O. 255, ('28) A. R. 323 [where it was held that the donor had not divested himself completely of all dominion over the property in that the deed of trust contained a condition that the trustees should not sell the property without the consent of the donor, and that the reservation of a life-interest by the donor to himself was therefore invalid].  
(b) (1922) 49 I.A. 195, 208-210, 44 All. 301, 214-416, 68 I.O. 264, ('22) A. P.C. 281.

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**139, 139A** [(a) *A* transfers and endorses Government promissory notes into the name of his son *B*, and delivers them to *B* as a gift, with a condition that *B* should pay the income thereof to *A* during his life. Both the gift and the condition are valid, and *B* is bound to pay the income to *A* during *A*'s life: *Nanab Umjad Ally v. Mohumdee Begum* (1867) 11 M.L.A. 517, 547-548, a Shia case. The same principle applies to a gift by a Sunni Mahomedan: *Mohammad v. Fakhr Jaham* (1922) 49 I.A. 195, 44 All. 301, 68 I.C. 254, ('22) A.P.C. 281.

(b) *A* makes a gift of his house to his son *B* with a condition that *B* should give the income of one-third of the house to *A*'s grandson *C* during *C*'s life. Both the gift and the condition are valid, and *B* is bound to pay the income to *C* during *C*'s lifetime: *Lali Jan v. Muhammad* (1912) 34 All. 478, 16 I.C. 105, a Sunni case.

(c) *A* makes a gift of certain property to her son *B* with a condition that *B* should pay out of the income thereof Rs. 40 every year to *C* during *C*'s life, and divide the remaining income equally between him (*B*) and *D* during *D*'s life. Both the gift and the condition are valid, and *B* is bound to pay Rs. 40 per annum to *C* and divide the remaining income equally between himself and *D* until *D*'s death: *Tavakalbai v. Imatijay Begam* (1916) 41 Bom 372, 39 I.C. 96, a Sunni case.

(d) A Mahomedan lady transfers certain immovable properties by way of gift to her nephews upon condition that they should pay her Rs. 900 every year for her maintenance. She also reserves a right of residence for herself in a portion of one of the properties. The deed of gift contains a stipulation that if the payments are not regularly made, she should be at liberty to recover them by a suit. This is not a valid gift, for the payment of Rs. 900 is not made dependent upon the profits of the *corpus* being sufficient to meet it, as in *ills*. (a), (b) and (c); the consideration for the transfer is the promise to make the payment in any event: *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 767, 103 I.C. 67, ('27) A.C. 808.

(e) A Mahomedan executed a deed of trust of part of his property for the benefit of his sons with the condition that he was to remain in possession so long as he lived with power to deal with the rents and profits and that the legal estate was to pass to his sons after his death.—Held that the condition was invalid as the donor reserved the legal and beneficial interest during his lifetime, that the gift was invalid as possession was not given to the sons; and that the gift was also invalid as it was to take effect *in futuro*: *Phul Bee v. R. P. M. Chettyar Prm* (1935) 13 Rang. 679, 156 I.C. 1038

(f) *A* makes a gift to *B* of the whole of his property on condition that *B* shall pay all *A*'s debts. The gift is valid and the condition is valid to the extent of the property gifted. Section 128 of the Transfer of Property Act is not in violation of any rule of Mahomedan law: *Krishna Behari v. Mt. Ahmad* (1925) 11 Luck. 199, 155 I.C. 303, ('35) A.O. 432.]

*Note*—The transaction in each of the illustrations (a), (b), (c) and (f) is in substance a *hiba-ba-shawt-ul-uwaz*, as to which see sec. 142 below.

**139A. Gift over.**—A gift of property to *A* and *B* in equal shares with a condition that if either of them died without leaving male issue his share should go to the other, is valid according to the Shia law (c).

According to the Sunni law, the condition would be void, and *A* and *B* would each take his share of the property absolutely, and it would descend on his death to his heirs; see sec. 138.

(c) *Muhammad Wahibunnisa v. Mushaf Hussain* (1927) 2 Luck. 187, 95 I.

O. 113, ('27) A.O. 328.

140. *Revocation of gifts.*—(1) A gift may be revoked by the donor at any time before delivery of possession. The reason is that *before* delivery there is no complete gift at all. Ch. XI, S. 140

(2) Subject to the provisions of sub-sec. (4), a gift may be revoked even after delivery of possession except in the following cases:—

- (1) when the gift is made by a husband to his wife or by a wife to her husband;
- (2) when the donee is related to the donor within the prohibited degrees;
- (3) when the donee is dead;
- (4) when the thing given has passed out of the donee's possession by sale (*d*). gift or otherwise;
- (5) when the thing given is lost or destroyed;
- (6) when the thing given has increased in value, whatever be the cause of the increase (*e*);
- (7) when the thing given is so changed that it cannot be identified, as when wheat is converted into flour by grinding (*f*);
- (8) when the donor has received something in exchange (*iwaz*) for the gift [see secs. 141 and 142].

(3) A gift may be revoked by the donor, but not by his heirs after his death.

(4) Once possession is delivered, nothing short of a decree of the Court is sufficient to revoke the gift. Neither a declaration of revocation by the donor nor even the institution of a suit for resuming the gift is sufficient to revoke the gift. Until a *decree* is passed, the donee is entitled to use and dispose of the subject of the gift.

*Hedaya*, 485; Baillie, 533-537. The reason why a gift to a person other than a husband or wife or to a person other than one related within the prohibited degrees may be revoked is thus stated in the *Hedaya*, p. 486: "The object of a gift to a *stranger* is a return:—for it is a custom to send presents to a person of high rank that he may protect the donor; to a person of inferior rank that the donor may obtain his services; and to person of equal rank that he may obtain an equivalent;—and such being the case it follows that the donor

(d) *Wali Bandi v. Fabeys* (1919) 41 All. 534, 59 I.C. 919; *Mulani v. Maula Baksh* (1924) 46 All. 260, 78 I.C. 222, (24) A.A. 307.

(e) *Ibid.*

(f) *Mogbul v. Ghafur-un-nissa* (1914) 36 All. 333, 24 I.C. 225.

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has power of annulment, so long as the object of the deed is not answered, since a gift is capable of annulment."

A gift by an uncle to his sister's son is revocable (g).

*Reservation of power of revocation.*—Where a settlor reserves to himself the power of revocation, the question arises whether a gift if made through the medium of a trust is valid and, if valid, whether the settlor is entitled to exercise the power of revocation. Beaman, J., was of the opinion that the reservation of the power of revocation detracted from the completeness of the gift. In such a case the donor could not be said to have parted with all control over the subject of the gift and therefore there was no valid gift (h). See sec. 126 of the Transfer of Property Act, 1882.

*Shia law.*—The Shia law differs from the Hanafi law in the following particulars:—

- (a) a gift to any blood relation, whether *within the prohibited degrees* or not, is irrevocable after delivery of possession;
- (b) a gift by a husband to his wife, or by a wife to her husband, is, according to the better opinion, *revocable* (Baillie, II, 205-206).
- (c) a gift may be revoked by a mere declaration on the part of the donor without any proceedings in Court [Baillie, II, p. 205, f.n. (10)].

**141. Hiba-bil-iwaz (gift with exchange).—**(1) A *hiba-bil-iwaz*, as distinguished from a *hiba* or simple gift, is a gift for a consideration. It is in reality a sale, and has all the incidents of a contract of sale. Accordingly possession is not required to complete the transfer as it is in the case of a *hiba*, and an undivided share (*mushaa*) in property capable of division may be lawfully transferred by it, though this cannot be done in the case of a *hiba* (i). Two conditions, however, must concur to make the transaction valid, namely, (1) actual payment of consideration (*iwaz*) on the part of the donee, and (2) a bona fide intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee (j). The adequacy of consideration is not material; but whatever its amount, it must be *actually and bona fide* paid (k). Such a transaction is called the *hiba-bil-iwaz* of India as distinguished from "true" *hiba-bil-iwaz* dealt

(g) *Ghulam Mohammad v. Din Mohammad* (1936) 166 I.O. 230, ('36) A. Pash 208.

(h) *Cassanally v. Currimbhoy* (1911) 36 Bom. 214, 248-249, 12 I.O. 225. (The head note is erroneous.)

(i) Baillie, 122-123; Macnaghten, pp. 51-52, ss 14 and 15; *Hutendra Singh v. Maharaja of Darbhanga* (1928) 55 I.A. 197, 7 Pat 500, 109 I.O. 868, ('28) A.P.C. 112; *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.O. 67, ('27) A.O. 808; *Fateh Ali v. Muhammad* (1928) 2 Lah. 428, 119 I.O. 258, ('28) A.L. 516; *Muhammad Hassan v. Safdar Mirza* (1935) 14 Lah. 478, 144 I.O.

45, ('33) A.L. 601; *Mt. Ainna v. Laksmichand* ('34) A.L. 705, 154 I.O. 979.

(j) *Mt. Khanunnisa v. Karamatulla* (1933) 142 I.O. 42, ('33) A.O. 99; *Mt. Bashirah v. Muhammad Hussain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 198 I.O. 161, ('41) A.O. 284.

(k) *Khajooroomissa v. Rowshan Jehan* (1876) 2 Cal. 184, 3 I.A. 291; *Muhammad Faw v. Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25; *Ohaudhri Mohd Hasan v. Muhammad Hassan* (1908) 28 All. 439, 33 I.A. 68; *Nohan Lal v. Mahmud* (1922) 44 All. 530, 67 I.O. 67, ('22) A.A. 847.

with in the notes below. It was introduced by the Muslim lawyers of India as a device for effecting a gift of mushaa in property capable of division (l). Ch. XI,  
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(2) The High Courts of Calcutta and Lahore have held that a transaction of this character is nothing but a sale; therefore, where the property is immovable and is of the value of Rs. 100 and upwards, it must be effected by a registered instrument as required by sec. 54 of the Transfer of Property Act, 1882, which relates to sales (m). As a sale, it also gives rise to a right of pre-emption (n).

(3) The Allahabad High Court, on the other hand, has held that a transfer by a husband of immovable property to his wife in lieu of her dower is not a sale but a transaction of true *hiba-bil-iwaz*. It may be effected orally by two gifts, the husband making a gift of the property to the wife and the wife in return making a gift to the husband of her right to recover dower from him. The transaction is not affected by the Transfer of Property Act nor is a registered instrument necessary but the requirements of the Mahomedan law as to delivery of possession and mushaa must be complied with (o). The Oudh Court has likewise refused to hold that all cases of *hiba-bil-iwaz* are sales and has followed the Allahabad decisions (p).

[ (a) *A* and *B*, two Mahomedan brothers, own certain villages which are held by them as tenants-in-common. *A* dies leaving his brother *B* and a widow *W*. Some time after *A*'s death, *B* executes a deed whereby he grants two of the villages to *W*. Two days after the date of the grant, but as part of the same transaction, *W* executes a writing whereby in consideration of the grant to her of the two villages she gives up her claim to her husband's estate in favour of *B*. The transaction is a *hiba-bil-iwaz*, and it is valid though possession may not have been delivered see *Muhammad Faiz v. Ghulam Ahmad* (1881) 3 All. 490, 8 I.A. 25.

(b) A Mahomedan executes a deed in favour of his wife whereby he grants certain immovable property to her in lieu of her dower. Possession of the property is not delivered to the wife. The transaction is nevertheless valid as *hiba-bil-iwaz*: *Muhammad Esuph v. Pattansa Ammal* (1899) 23 Mad. 70

(c) A Mahomedan lady, who owns an undivided share (mushaa) in an immovable property which is capable of division, executes a deed whereby she transfers her share in the property by way of gift to her two nephews in con-

(l) Baillie, p. XXXV.

(m) *Abbas Ali v. Karim Baksh* (1900) 13 C.W.N. 160, 4 I.C. 468; *Sarjuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808, *Saburannessa v. Sabdu Sheikh* (1934) 88 Cal. W.N. 747, 152 I.C. 429, ('34) A.O. 693; *Gopaldas v. Sakina Bibi* (1936) 16 Lah. 197, 156 I.C. 70, ('36) A.L. 807

(n) *Satyendra Nath v. Fulsom Bibi* (1932) 36 C.W.N. 486, 139 I.C. 403, ('32) A.O. 625.

(o) *Kulsum Bibi v. Bashir Ahmed* (1937) All. 285, 166 I.C. 439, ('37) A. A. 25; *Kulsum Bibi v. Shiam Sunder Lal* (1938) All. J. 1027, 164 I.C. 515, ('38) A.L. 600.

(p) *Abdul Hamid v. Abdul Ghani* (1934) 148 I.C. 801, ('34) A.O. 163.

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sideration of the nephews paying Rs. 999 to her every year for her maintenance. The deed provides that if they fail to make the payments regularly, she should be at liberty to recover them by a suit. The deed is duly registered. The transaction is not a *hiba*, and it is valid though it is a transfer of a *mushaa*: *Sarfauddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I.C. 67, ('27) A.C. 808.

*True nature of transaction.*—Though a transaction may be described in the plaint as a *hiba-bil-waz*, it is open to the plaintiff to show that it was in fact a simple *hiba* provided that the point is raised at an early stage of the proceedings (q).

(d) A Mahomedan dies leaving two brothers and a daughter. Subsequently each brother relinquishes his share in the estate of the deceased in favour of the daughter in consideration of the other doing so. The transaction is not a *hiba*, the relinquishment by one brother being the consideration for relinquishment by the other, and delivery of possession to the daughter is not necessary to validate the transaction (r).

A gift "in consideration of your being my cousin" is not a gift for a consideration or a *hiba-bil-waz*. Such a transaction is a *hiba* or gift simple, and delivery of possession is necessary to validate the gift (s). Similarly a gift "for having with cordial affection and love rendered service to me, and maintained and treated me with kindness and indulgence, and shown all sorts of favour to me," is a *hiba* or gift simple. Such a transaction is not a *hiba-bil-waz*; there being no *waz* or consideration, and delivery of possession is necessary to validate the gift (t).

*Adequacy of consideration.*—In *Khajooroonissa v. Rowshan Jehan* (u) which is the leading case on the subject, their Lordships of the Privy Council said: "Undoubtedly the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount, it must be actually and *bona fide* paid." It would seem to follow from this, that however small the consideration for a *hiba-bil-waz* may be, the transaction would be valid if the consideration was actually and *bona fide* paid. A mere promise to pay is not sufficient (v). In a Bombay case, decided before the above Privy Council case, there was a grant by A to B of property, and the consideration for the grant was stated to be Rs. 10. It was held that the consideration being only Rs. 10, the transaction could not be sustained as a *hiba-bil-waz* (w). This decision can no longer be regarded as good law. Even a copy of the Koran is a good consideration for a *hiba-bil-waz* (x).

*Intention to transfer in present.*—Where property was transferred to a donee subject to a reservation of the possession and enjoyment to the donor and his wife during their lives, it was held by their Lordships of the Privy Council that there was no intention on the part of the donor to divest himself in *presenti* of the property, and that the transaction could not be upheld as a *hiba-bil-waz* (y).

- (q) *Sarfauddin v. Isah* (1922) 49 Cal. 161, 70 I.C. 203, ('22) A.O. 258.  
*Sardar Khatun v. Secretary of State* (1939) Kar 348, 179 I.C. 252, ('39) A.S. 9.  
 (r) *Ashutbai v. Abdulla* (1906) 31 Bom 271.  
 (s) *Jafar Ali v. Ahmed* (1868) 5 Bom H.C. A.C. 37.  
 (t) *Rohim Bakh v. Muhammad Hasan* (1888) 11 All 1; *Ewas Muhammad v. Gajoor Khan* (1934) 147 I.C. 867, ('34) A.O. 27.  
 (u) (1876) 2 Cal 184, 197, 8 I.A. 291, 308.  
 (v) *Mohammad Yahya Ali Shah v. Sardar*

- Ali Shah* (1939) P.L.R. 267, 184 I.C. 558, ('39) A.L. 292.  
 (w) *Rujabai v. Ismail* (1870) 7 Bom H.C. O.C. 27, 30.  
 (x) *Abbas Ali v. Karim Bakh* (1909) 13 Cal.W.N. 160, 4 I.C. 466.  
 (y) *Chaudhri Mehdi Hasan v. Muhammad Hasan* (1906) 28 All. 429, 453, 93 I.A. 68 (it was also found that no consideration passed from the donee to the donor); *Moosa Adam Patel v. Ismail Moosa* (1909) 12 Bom L.R. 159, 194, 5 I.C. 946; *Mt. Bashiran v. Mohammad Hussain* (1941) 16 Luck. 615, 193 I.C. 161, ('41) A.O. 284; *Mohammad*

Where in a registered deed of gift it was stated that the donor made the gift in favour of his wife in lieu of her dower debt and that he had put the donee in possession of the land gifted from the date of its execution and it was further stated that he had no further concern with the land gifted, and that all his rights were thereafter to be enjoyed by the donee, the gift was held to be valid although the possession of the land was not delivered (x).

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*True hiba-bil-waz.*—*Hiba-bil-waz* means, literally, a gift for an exchange. It is of two kinds, one being the true *hiba-bil-waz*, that is, *hiba-bil-waz* as defined by the older jurists, and the other the *hiba-bil-waz* of India. In the former there are two acts, namely, (1) the *hiba*, which is followed by (2) an independent and uncovenanted *waz* (return-gift), that is, an *waz* not stipulated for at the time of the *hiba*. In the latter there is only one act, the *waz* on exchange being involved in the contract of gift as its *direct consideration*. Bailie, 122. In the true *hiba-bil-waz*, the *hiba* and *waz* are both governed by the law of gifts. There must be delivery of possession both of the *hiba* and *waz*, and they are both subject to the doctrine of *nishaa*. The donor may even after delivery revoke the gift [s. 140] at any time before the *waz* is delivered to him, but after delivery of the *waz* neither party can revoke his gift. The transaction consists of *two distinct acts of donation* between two persons each of whom is alternately the donor of one gift and the donee of the other. Thus if *A*, without having stipulated for any return, makes a gift of a ring to *B* and delivers it to him, and *B*, without having promised it, subsequently makes a gift of a watch to *A*, saying that it is the *waz* or return for the gift of the ring, and delivers the watch to him, the transaction is a true *hiba-bil-waz*, and neither *A* nor *B* can revoke the gift. But if *B* delivers the watch to *A* without saying that it is the *waz* or return for his gift, the transaction does not amount to a *hiba-bil-waz*. The case is then one of two *hibas*, and either party may revoke his *hiba* [s. 140]. If *A* makes a gift of a ring to *B* saying, "I have given this to you for so much," it is a *hiba-bil-waz* of India. It is in reality a sale, while a true *hiba-bil-waz* is not a sale either in its inception or completion (a).

**142. Hiba-ba-shart-ul-waz.**—Where a gift is made *with a stipulation (shart)* for a return, it is called *hiba-ba-shart-ul-waz*. As in the case of a *hiba* (simple gift), so in the case of a *hiba-ba-shart-ul-waz*, delivery of possession is necessary to make the gift valid, and the gift is also revocable (s. 140). But the gift becomes irrevocable on delivery by the donee of the *waz* (return) to the donor (b).

The main distinction between the *hiba-bil-waz* of India, and *hiba-ba-shart-ul-waz* is that delivery of possession is not necessary in the former case, while it is necessary in the latter case.

The main distinction between *hiba-bil-waz* as defined by the older jurists and *hiba-ba-shart-ul-waz* is that in the former the *waz* proceeds voluntarily

*Yahya Ali Shah v. Sardar Ali Shah* (1939) P. L. R. 267, 184 I. C. 556, ('39) A. L. 292  
(z) *Mt. Bashir v. Mohammad Husain* (1941) 18 Luck. 615, 193 I. C. 161, ('41) A. O. 284; *Mohammad Kazim Husain v. Mt. Nadri Begum* (1941) O. W. N. 532, 194 I. C. 87 ('41) A. O. 348.  
(a) Bailie, 122-123, 641-643; *Rahim Baksh v. Muhammad Hasan* (1888) 11 All. 1; *Sarifuddin v. Mohiuddin* (1927) 54 Cal. 754, 105 I. C. 67,

('27) A. C. 808; *Kulsum Bibi v. Bashir Ahmed* (1937) All. 285, 165 I. C. 439, ('37) A. A. 25; *Kulsum Bibi v. Shiam Sunder Lal* (1935) All. L. J. 1027, 164 I. C. 515, ('35) A. A. 600.  
(b) Bailie, 543-544; *Hedaya*, 488; *Mogul-sha v. Mahammad Sahib* (1887) 11 Bom. 517 [having regard to the decision that possession was necessary, the transaction is wrongly described in the judgment as *hiba-bil-waz*]



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from the donee of the gift, while in the latter it is expressly stipulated for between the parties. The former bears the character of a gift throughout and does not partake of the character of a sale either in its inception or completion, while as regards the latter, it is a gift in its first stage, but it partakes of the character of a sale after possession has been taken by the donee of the thing given and by the donor of the *was*, so that the transaction, when completed, is exposed to *shufaa* or preemption, and either party may return the thing delivered to him for a defect. These two incidents, namely, the right of preemption and the right to return a thing for a defect, are two of the incidents of the contract of sale in the Mahomedan law. As *hiba-ba-shari-ul-was* is not common in India, it is useless to pursue the matter further. As to the incidents of sale in Mahomedan law, the student is referred to Baillie's Digest, 2nd ed., Introduction to the Chapter on Sale, pp. 775-783.

See ill- (a), (b) and (c) to see 139, and notes

**143. Areeat.**—The grant of a license, resumable at the grantor's option, to take and enjoy the usufruct of a thing, is called *areeat* (c).

*Hedayat*, 478

A *hiba* is a transfer of ownership without consideration. A *hiba-bil-was* is a transfer of ownership for a consideration. An *areeat* is not a transfer of ownership, but a temporary license to enjoy the profits so long as the grantor pleases, and is defined by the author of Durrul Mukhtar as "making another the owner of the usufruct without any consideration". A *hiba* is revocable except in certain cases (s. 140). A *hiba-bil-was* is not revocable in any case. An *areeat* is revocable in every case.

**144. Sadaqah.**—A *sadaqah* is a gift made with the object of acquiring religious merit. Like *hiba*, it is not valid unless accompanied by delivery of possession; nor is it valid if it consists of an undivided share in property capable of division [see. 134]. But unlike *hiba*, a *sadaqah*, once completed by delivery, is not revocable; nor is it invalid if made to two or more persons all of whom are *poor* [s. 135].

Baillie, 554-556, *Hedayat*, 489. The distinction between *hiba* and *sadaqah* lies in the object with which it is made. In the case of *hiba*, the object is to manifest affection towards the donee, or to win his regard or esteem; in the case of *sadaqah*, the object is "to acquire merit in the sight of the Lord." A gift of property even to the rich would be a *sadaqah* if made with the object of acquiring religious merit.

*Sadaqah distinguished from wakf.*—In the case of a *sadaqah*, the corpus may be consumed; in the case of a wakf, the income only can be spent (d). See secs. 168 and 169 below.

**145. Gift by a Mahomedan governed by Marumakkatayam law to a tawazhi.**—A tawazhi consists of a mother and all her

(c) *Muhammad Fais v. Ghulam Ahmad* (1881) 3 All. 490, 8 I. A. 25, 38. *Mumtaz-un-Nissa v. Tufail* (1906) 28 All. 264, as explained in *Khud Ahmad, In the matter of* (1908) 30 All. 309. *Muhammad Sidiq v. Rindard* (1927) 2 Luck. 216, 95 I. C. 220, ('26) A.O. 360; *Nasir*

*uddin v. Khairat Ali* (1938) 13 Luck. 713, 172 I.C. 884, ('38) A.O. 51.

(d) *Ramanadham v. Vada Leuva* (1911) 34 Mad. 12, 14; *Abdulrazak v. Abdulker* (1930) 54 Bom. 358, 369, 127 I.C. 401, ('30) A.B. 101.

children and descendants in the female line. It is a corporate unit, and capable of holding property as such. Therefore, where a Mahomedan who follows the Marumakkatyam law, makes a gift of property to his wife and *all* her children constituting a tawazhi, without any expression of intention as to how they are to hold and enjoy it, the gift will be deemed to be a gift to the tawazhi, and the donees will take the property subject to the incidents of an ordinary tarwad or tawazhi property, one of which is impartibility (*e*). But when the gift is to the wife and her children by him, to the exclusion of her children by a former husband, the gift cannot be deemed to be one to a tawazhi, and the donees will take the property as tenants-in-common in equal shares with power to alienate their respective interests (*f*).

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| <p>(e) <i>Kunhacha</i> <i>Umma v. Kutta Mamma</i><br/>(1898) 16 Mad 201; <i>Chakkra</i><br/><i>Zannan v. Kunhi Pokker</i> (1916) 39<br/>Mad 317, 20 I.O. 755.</p> | <p>(f) <i>Moorthyyan Kutty v. Ayissa</i> (1928) 51<br/>Mad. 574, 110 I.O. 480, ('28)<br/>A.M. 870</p> |
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## CHAPTER XII.

### WAKFS.

**Ss. 146, 146A.** 146. Wakf as defined in the Wakf Act.—“Wakf means the permanent (s. 146A) dedication by a person professing the Mussalman faith of any property (s. 146B-146D) for any purpose recognized by the Mussalman law as religious, pious or charitable (s. 146E).”

The above is the definition of wakf as given in the Mussalman Wakf Validating Act, No. VI of 1913, s. 2. That Act came into force on the 7th March, 1913. It has a retrospective effect, and applies to all wakfs, whether created before or after that date: see sec. 162 below. Referring to the above definition, the Judicial Committee observed that it was a definition for the purposes of the Act, and not necessarily exhaustive (a).

*Wakf as defined by Mahomedan jurists.*—The term wakf literally means *detention*. The legal meaning of wakf, according to Abu Hanifa, is the detention of a specific thing in the ownership of the wakf or appropriator, and the devoting or appropriating of its profits or usufruct “in charity on the poor or other good objects.” According to the two disciples, Abu Yusuf and Muhammad, wakf signifies the extinction of the appropriator’s ownership in the thing dedicated and the *detention* of the thing is the implied ownership of God, in such a manner that its profits may revert to or be applied “for the benefit of mankind.” Baillie, 557-558. See *Hedaya*, 231, 234. A wakf extinguishes the right of the wakif or dedicator and transfers ownership to God. The mutawalli is the manager of the wakf, but the property does not vest in him, as it would in a trustee in English law (b). The expression “vested in trust” in section 10 of the Limitation Act does not apply to the mutawalli of a wakf (c); and it was for this reason that the section was amended by s. 2 of the Limitation Act, 1929. It is also for this reason that the Indian Trusts Act, 1882, exempts from its scope the rules of law applicable to wakfs (d). A wakf, however, is a trust for the purposes of s. 92 of the Code of Civil Procedure (e).

**146A.** The dedication must be permanent.—The dedication must be permanent. A wakf, therefore, for a limited period, e.g., twenty years, is not valid. Further, the purpose for which a wakf is created must be of a permanent character.

Baillie, 565; *Hedaya*, 234. See sec. 160 below.

(a) *Ma Mi v. Kallander Ammal* (1927) 54 I.A. 23, 27, 6 Rang. 7, 100 I.C. 32, ('27) A.P.O. 22.  
(b) *Muhammad Rustom Ali v. Mustaq Hussain* (1920) 47 I.A. 224, 42 All. 609, 57 I.C. 329.  
(c) *Ali Akbar Rakhai v. Shah Mohammad Abdur Rahim* (1934) 61 I.A. 50, 56 All. 111, 147 I.C. 687, ('34)

A.P.O. 77.  
(d) *Per Ameer Ali, J.*, in *Vaidya Varuti v. Balusami* (1921) 48 I.A. 803, 44 Mad. 831, 65 I.C. 161, ('22) A.P.O. 123.  
(e) *Mahomed Kuzum v. Syed Abi* (1932) 11 Pat. 238, 138 I.C. 417, ('32) A.P.O. 38.

The dedication is not permanent and the wakf is invalid, if the wakfnama contains a condition that in case of mismanagement the property should be divided among the heirs of the settlor (*f*). Nor can the dedication be permanent if the wakif is only a usufructuary mortgagee and has no permanent control over the property (*g*).

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**146B. Subject of wakf.**—The subject of wakf under the Wakf Act may be “any property.” A valid wakf may, therefore, be made not only of immovable property, but also of movables, such as shares in joint stock companies, Government promissory notes, and even money (*h*).

In cases before the Wakf Act, there was a conflict of opinion whether a valid wakf could be made of movables. It was held in Calcutta, Bombay and Madras, that a valid wakf could not be made of movables, unless the movables were accessory to the immovable property, such as cattle attached to agricultural land and implements of husbandry, or unless a wakf of movables was allowed by custom (*i*). This was in accordance with the view taken by Mahomedan jurists on the subject: Baillie, 570-571; *Hedaya*, 234-235. On the other hand, it was held in Allahabad that a valid wakf may be made of movables, and that a wakf even of coins or shares in a joint stock company was not invalid (*j*). Such a wakf would be valid under the Wakf Act. In a recent Privy Council case the question arose whether a valid wakf can be made under the Wakf Act of Government promissory notes, but it was not decided, as the wakf had been acted upon for a number of years and it was held valid on that ground (*k*).

**146C. Subject of wakf must belong to wakif.**—The property dedicated by way of wakf must belong to the wakif (dedicator) at the time of dedication (*l*). A person who is in fact the owner of the property but is under the belief that he is only a mutawalli thereof is competent to make a valid wakf of the property. What is to be seen in such cases is whether or not that person had a power of disposition over the property (*m*).

Baillie, 562.

**Wakf of property subject to mortgage or lease.**—A valid wakf may be made of property though it is subject to a mortgage (*n*) or a lease (*o*): Baillie, 563-564.

(f) *Habib Ashraf v. Syed Wajhuddin* (1933) 144 I.C. 654, ('33) A.O. 222

(g) *Rahman v. Bagridan* (1936) 11 Luck 735, 160 I.C. 495, ('36) A.O. 213

(h) *Abdulakur v. Abubakkar* (1930) 54 Bom. 358, 369-370, 127 I.C. 401, ('30) A.D. 181. Cf. *Syed Ali Zamin v. Syed Akbar Ali Khan* (1937) 64 I.A. 158 (a Shia case)

(i) *Kulcom Bibee v. Gulam Hussein* (1905) 10 Cal. W.N. 449, *Fatmabas v. Gulam Hussein* (1907) 9 Bom. L.R. 1337; *Kadir Ibrahim v. Mahomed* (1909) 33 Md. 118, & I.C. 136.

(j) *Abu Sayid v. Bakor Ali* (1901) 24 All. 190; see *Hashim Haroon v. Gounsalwah* (1942) Kar. 179, ('42) A.S. 137.

(k) *Mohammad Sadiq v. Fakhr Jahan Begam* (1932) 59 I.A. 1, 17-18, 6

Luck 556, 136 I.C. 385, ('32) A.P.C. 14

(l) *Mashhuddin v. Ballabh Des* (1912) 35 All. 68, 17 I.C. 471, *Ehsan Beg v. Rahmat Ali* (1934) 10 Luck. 547, 152 I.C. 798, ('35) A.O. 47, *Mahomed Ali v. Dinesh Chandra Roy* (1940) 2 Cal. 189, 44 C.W.N. 718, ('40) A.C. 417.

(m) *Haider Husain v. Sudann Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) A.O. 18

(n) *Shahzadee v. Khaja Hussein* (1869) 12 W.R. 498; *Sinjira v. Mohammad* (1922) 49 Cal. 477, 483, 67 I.C. 77, ('22) A.C. 429.

(o) *Hashim Ali v. Ifat Aze Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.O. 180 (case under the Shia Law)

**Ss. 146C, 146D.** *Usufructuary mortgagee.*—A usufructuary mortgagee cannot make a valid wakf of his rights for he is not the owner and the mortgage is an evasion of the Mahomedan law against usury (*p*).

*Groveholder.*—A groveholder has permanent dominion and full proprietary right over the trees. A wakf of full groveholder's rights is therefore valid (*q*).

*Property agreed to be purchased by wakf.*—A valid wakf may be made of property, of which the wakf has been put in possession under a contract for the purchase thereof by him, provided the sale is eventually completed (*r*).

*Wakf in fraud of heirs.*—A wakfnama executed by a widow as part of a transaction which is a fraud on the heirs of her husband is altogether void and not effective even against the share which she inherits (*s*).

*Dower debt.*—A dower debt which may or may not be paid to the widow at the option of the residuaries cannot be made the subject of a wakf (*t*).

**146D. Wakf of mushaa.**—A mushaa or an undivided share in property may, according to the more approved view, form the subject of wakf, whether the property be capable of division or not.

*Exception.*—The wakf of a mushaa for a mosque or burial ground is not valid, whether the property is capable of division or not (*u*).

*Hedaya*, 233; *Baillie*, 573. The approved opinion above referred to is that of Abu Yusuf. According to Muhammad, the wakf of a mushaa in property capable of partition is not valid, for he holds that delivery of possession by the endower to a *mutawalli* is a condition necessary for the validity of a wakf, see sec. 151 below. But though Abu Yusuf holds that a wakf of a mushaa is valid though the property may be capable of partition, he has declared that a wakf of a mushaa for a mosque or burial ground is invalid. He gives two reasons, one of which is that "the continuance of a participation in anything is repugnant to its becoming the exclusive right of God."

It follows from what is stated above that one of several heirs of a deceased Mahomedan cannot make a valid wakf of his undivided share of the inheritance for a mosque or burial ground though he may do so for other purposes. In a Rangoon case (*v*), however, it was held, relying on a passage in Wilson's Anglo-Mahomedan Law, 6th ed., para. 321, and on the judgment of the Privy Council in *Muhammad Muntaz v. Zubaida Jan* (*w*), that if one of several heirs takes possession of the whole property and delivers possession of it to the trustees of a mosque for the benefit of the mosque, though it be without the consent of the other heirs, the wakf is valid to the extent of his own share. The passage referred to above is in these terms: "But if a wakf is valid as in the cases noted in n 1 above, they are valid for the endowment or construction of mosques or burial grounds." This passage appears for the first time in the

(*p*) *Rahman v. Bagridan* (1936) 11 Luck 735, 160 I.C. 495, ('36) A.O. 213.

(*q*) *Haji Amir Ahmed v. Mohammad Ejaz Hussain* (1936) 58 All. 464, 160 I.C. 354, ('36) A.A. 15.

(*r*) *Muhammad Bismilla v. Mohammad Ali* ('27) A.O. 162, 102 I.C. 77.

(*s*) *Hor Praend v. Fayaz Ahmad* (1933) 60 I.A. 116, 55 All. 83, 142 I.C. 217, ('33) A.P.O. 83.

(*t*) *Noek Ali v. Shemrannusa Bibi* (1939)

All. 722, 1939 A.L.J. 138, 188 I.C. 379, ('39) A.A. 319.

(*u*) *Mohammad Badrul v. Shah Hasan* (1935) All.I.J. 460, 159 I.C. 37, ('35) A.A. 278; *Mahomed Ayub Ali v. Amir Khan* (1939) 43 C.W.N. 118, 181 I.C. 76, ('39) A.C. 268.

(*v*) *Abdul Rahman v. Maung Mutu* ('32) A.R. 65, 138 I.C. 851.

(*w*) (1889) 11 All. 460, 16 I.A. 205.

6th ed., and the cases referred to there are cases of a wakf of a mushaa for purposes *other than a mosque or a burial ground*. The Privy Council case referred to above is a case of a gift of a mushaa. A wakf of a mushaa for a mosque or burial ground is invalid for the specific reasons stated by Abu Yusuf. A single judge of the High Court of Calcutta has, however, held that when a mosque or a tomb already exists on a different part of a land and an undivided share of another property is dedicated for the upkeep of such a mosque or burial ground the dedication is valid (x).

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**146E. Objects of wakf.**—The purpose for which a wakf may be created must be one recognized by the Mahomedan law as “religious, pious or charitable” [Wakf Act, s. 2 (1)]. A wakf may also be created in favour of the settlor’s family, children and descendants [Wakf Act, s. 3].

A. The following are valid objects of a wakf.—

- (1) mosques and provision for imams to conduct worship therein (y);
- (2) colleges and provision for professors to teach in colleges (z);
- (3) aqueducts, bridges and caravanserais (a);
- (4) distribution of alms to poor persons, and assistance to the poor to enable them to perform the pilgrimage to Mecca (b);
- (5) celebrating the birth of Ali Murtaza (c);
- (6) keeping *tazias* in the month of Muharram (d), and provision for *chamels* and *dildut* for religious processions during Muharram (e);
- (7) repairs of inambaras (f);
- (7a) the maintenance of a khankah (g);
- (8) celebrating the death anniversaries (*barsa*) of the settlor and of the members of his family (h);
- (9) performance of ceremonies known as *kadam sharif* (i);
- (10) burning lamps in a mosque (j);
- (11) reading the Koran in public places, and also at private houses (k);
- (12) performance of annual *fateha* of the settlor and of the members of his family (l);

[The ceremony of *fateha* consists in the recital of prayers for the welfare of the souls of deceased persons, accompanied with distribution of alms to the poor].

- (13) the construction of a “robot” or free boarding house for pilgrims at Mecca (m);

(x) *Mahomed Ayub Ali v. Amir Khan* (1939) 43 C W N 118, 181 I C 76, (‘39) A.C. 268.

(y) *Baillie*, 574.

(z) *Baillie*, 574.

(a) *Hedaya*, 240.

(b) *Hedaya*, 240.

(c) *Biba Jan v. Kalb Husain* (1909) 31 All 136, 1 I.O. 763; *Sayid Ismael v. Hamidi Begum* (1921) 6 Pat.L.J. 218, 235-236, 62 I.C. 455, (‘21) A.P. 125; *Haji Abdul v. Hafiz Hamid* (1903) 5 Bom L.R. 1010 [Cutchi Memon will].

(d) *Ibid.*

(e) *Syed Ali v. Syed Muhammad Ali* (1926) 7 Pat 426, 116 I.C. 525, (‘26) A.P. 441.

(f) See cases cited in foot-note (c)

(g) *Mahomed Kasim v. Syed Abi* (1932) 11 Pat. 288, 136 I.O. 417, (‘32) A.

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(h) See cases cited in foot-note (c).

(i) *Phul Chand v. Akbar Yar Khan* (1896) 19 All 211

(j) *Mazhar Husain v. Abdul* (1911) 33 All. 400, 9 I.O. 753

(k) *Ibid.*

(l) *Luchmiput Singh v. Amir Atum* (1882) 9 Cal 176; *Phul Chand v. Akbar Yar Khan* (1896) 19 All 211; *Biba Jan v. Kalb Husain* (1909) 31 All 136, 1 I.C. 763, see p. 139 of the report; *Mazhar Husain v. Abdul* (1911) 33 All. 400, 9 I.C. 753, [Stanly, C. J., dissenting]; *Mutu Ramadani v. Vava Leva* (1917) 44 I.A. 21, 27, 40 Mad. 116, 122, 89 I.C. 235. See also *Salehbi v. Safabu* (1912) 36 Bom. 111, 13 I.O. 702.

(m) *Mahomed Yusuf v. Muhammad Sadiq*

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(14) maintenance of poor relations and dependants (n).

B. The following are not valid objects of a wakf:—

- (i) objects prohibited by Islam, e.g., erecting or maintaining a church or a temple: Baillie, 560;
- (ii) the Madras High Court has held that if there is no distribution of alms the reading of the Koran and the performance of ceremonies for the benefit of the soul of the deceased is not a valid object of a wakf (o). This is on the ground that the object though religious and pious is not charitable: *sed quare*, for there is nothing in the Indian Statutes or in Mahomedan law which draws a clear-cut distinction between religious and pious purposes on the one hand, and charitable purposes on the other (p). In the Bombay High Court Mirza, J., has held that the performance of such ceremonies whether at the tomb of a saint or the grave of a private person is the valid object of a wakf (q);
- (iii) the High Court of Allahabad had held, following the opinion of Ameer Ali, expressed in his Mahomedan law [4th ed., vol. 1, p. 276], that a provision for the wages and pensions of servants and dependants is valid (r). A similar question arose in a case before the Privy Council (s), and it was argued, relying on the same passage in Ameer Ali's work, that a wakf for servants was valid, but the point, it would appear, was later on abandoned, and the Board said: "It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act (VI of 1913)." The Chief Court of Oudh has taken the view that a wakf providing for maintenance of servants is valid under Mahomedan law. In *Hashim Ali v. Ifat Ara Hamidi Begum*, the Calcutta High Court has taken the view that a provision for a small pension for three of the faithful servants would not render the wakf invalid, as the main purpose of the wakf in question was not to make a settlement on those servants (t).
- (iv) A wakf in favour of utter strangers was held to be invalid although there was an immediate and substantial gift to charity (u).

**146F. Wakf void for uncertainty.**—The objects of a wakf must be indicated with reasonable certainty; if they are not, the wakf will be void for uncertainty [see note (1)]. But it is not necessary that the objects should be *named* (v). Nor is it necessary, where the objects are specified, to name the sum to be spent on each object (w) [see note (2)].

- (1923) 14 Lah. 431, 144 I C. 271, ('33) A L 501  
(n) *Mukarram v. Anjum-an-Nissa* (1923) 45 All 152, 69 I C 836, ('24) A A 223  
(o) *Kaleela v. Nusrudeen* (1894) 18 Mad 201, *Kunhamutty v. Ahmed Musallur* (1935) 58 Mad 204, 154 I C 151, ('35) A M 29.  
(p) *Ghulam Hossain Shah v. Syed Muslim Hossain* (1934) 58 Cal L J 356, 150 I C 124, ('34) A C 348  
(q) *Abdulsukur v. Abubakkar* (1930) 51 Bom 358, 127 I C 411, ('30) A. B 191, *Azimmunissa Begum v. Sunder Ali Khan* (1927) 29 Bom L R 434, 102 I C 129, ('27) A B 387 dissenting from *Fakrudin v. Kuyyattullah* (1910) 7 All L J 1095, 8 I C 678.  
(r) *Ghulam Mohammad v. Ghulam Hussain*

- (1932) 59 I.A. 74, 85, 54 All. 93, 136 I C 454, ('32) A.P.O. 81.  
(s) *Ibid* at p. 86  
(t) *Ali Akhtar Banu Begum v. Kanhaya Lal* (1941) 16 Luck 769, (1941) O W N 829, 195 I C 326, ('41) A O 492; *Hashim Ali v. Ifat Ara Hamidi Begum* (1942) 46 C W N. 561, 74 Cal L J 261, ('42) A.C. 182  
(u) *Ismaul Hays Arat v. Umar Abdulla* (1942) 44 Bom L.R. 256, ('42) A B 155  
(v) *Shrikkh Ramzan v. Musammal Rahmani* (1932) 7 Luck 300, 135 I C 372, ('32) A O 71; *Gangabai v. Tharar* (1863) 1 Bom H C O C 71.  
(w) *Mutu Ramenadan v. Yauz Levvai* (1916) 44 I.A. 21, 28-29, 40 Mad.

*Note (1).*—According to the English law the object of trusts, whether private or public, must be certain, otherwise the trust is void for uncertainty. The leading English case on public trusts is *Morice v. The Bishop of Durham* (x). In that case it was held by Lord Eldon that a bequest for “such objects of benevolence or liberality as the executor should most approve of” was too vague to be enforced. It has similarly been held that a trust for “charitable or benevolent purposes” (y), or for “purposes charitable or philanthropic” (z), or for “such charitable or public purposes as my trustee thinks proper” (a), is void for uncertainty. Following this principle, it has been held by the Privy Council that a gift by a Hindu for *dharma*, an expression equivalent to “charitable, religious or philanthropic purposes,” is void for uncertainty (b).

Turning now to Mahomedan cases, there appears to be a conflict of decisions. The High Court of Bombay expressed the opinion in an old case that a bequest by a Khoja Mahomedan for *dharma* was void for uncertainty (c). In a later Bombay case, a bequest by a Mahomedan for *dharma, khairat, vegera*, was held to be void for uncertainty. The Gujarati word “*khairat*,” it was said, was derived from the Arabic “*khairat*,” and that “*khair*” in Arabic means “good,” and “*khairat*” means “good works, alms, charities” (d). In a Punjab case it was held that a *wakf* for such charitable objects as the trustees should think proper and for such purpose as that the settlor should obtain certain bliss therefrom, is void for uncertainty (e). In an Allahabad case it was held that a *wakf* for *fateha* and for *amar-i-khair* including the maintenance of poor relations and dependants was not void for uncertainty (f). In another Allahabad case the opinion was expressed that a trust for “*khairat*” or for “*khairati kam*” was valid, and in such a case, specification of objects of charity is not necessary. But, if a trust is for *ummr khair* or *kare khair*, it is a question of construction in what sense the expression is used, and if it is used in the sense of benevolent purposes or good purposes, the trust will be void for uncertainty (g). But “*amar-i-khair*” means “*khair*” or “good” works, and if that is the correct meaning of the word, [see *Muhammad Yusuf v. Azimuddin* (g) below], the *wakf* would be void for uncertainty, unless it can be said that when a Mahomedan dedicates his property by way of *wakf* for “good works,” it must be taken that the dedication is for “purposes recognized by the Mussalman law as religious, pious, or charitable” within the meaning of sec. 2 (1) of the Wakf Act. This contention was accepted in an Oudh case (h), but the Lahore High Court has dissented holding that the use of the general words of the proviso to sec. 3 of the Wakf Act “religious and charitable objects” is not a sufficient specification of the object (i). A Full Bench of the Chief Court of Oudh, however, has now taken the view that a dedication in general terms for “charitable purposes” highly commendable according to the Hanafi school of Mussalman law is not a valid dedication (j). The High Court of Calcutta in a recent case has held that the use of the general words of the proviso to

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- 116, 39 I O 235, ('16) A P C  
86; *Syed Shah v. Syed Abi* (1932)  
11 Pat 288, 325-326, 136 I O  
417, ('32) A.P. 83.  
(x) (1804) 10 Ves. 522.  
(y) *In re Riland* (1881) W.N. 173.  
(z) *In re Macduff* (1896) 2 Ch. 463.  
(a) *Blair v. Duncan* [1902] A C 37;  
*Grmond v. Grmond* [1905] A C  
124.  
(b) *Runchordas v. Parvatibai* (1899) 23  
Bom 735, 26 I A 71.  
(c) *Gangabai v. Thavar* (1863) 1 Bom II.  
O O C 71.  
(d) *Murambi v. Fatmabai* (1928) 31 Bom  
L.R. 135, 116 I.O. 242, ('29) A.  
B 127.  
(e) *Shahab-ud-Din v. Sohan Lal* (1907)  
Punjab. Rec. No. 75. See also *Ad-  
General v. Hormusji* (1905)

- 29 Bom 375  
(f) *Mukarram v. Anjuman-un-Nisa* (1923)  
45 All 152, 69 I O 838, ('24) A.  
A 233.  
(g) *Muhammad Yusuf v. Azimuddin* (1941)  
All 443, (1941) A L J 269, 196  
I O. 324, ('41) A.A. 235.  
(h) *Sheikh Ramzan v. Musammal Rahma-  
ni* (1932) 7 Luck. 800, 135 I O  
372, ('32) A O. 71.  
(i) *Punjab Sindh Bank v. Anjuman Hi-  
mayet Islam* (1935) 158 I.C. 937,  
('35) A L 596.  
(j) *Ahmadi Begum v. Badrum Nisa* (1940)  
15 Luck. 586, (1940) O. W. N.  
689, 189 I O. 891, ('40) A. O.  
324 (P B.). See *Muhammad Yusuf  
v. Azimuddin* (1941) All. 443,  
(1941) A.L.J. 269, 196 I.O. 324,  
('41) A.A. 235.



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sec. 3 of the Wakf Act without specification of the object of charity does not invalidate a wakf as it contemplates an ultimate gift effective in law and that the ultimate benefit in a wakf-alal-lah can also be impliedly reserved for the poor or for any purpose of a permanent character. Those purposes need not be expressed in clear terms in the wakfnama. In that case it was held that the wakf deed manifested an overriding intention to charity in the contingency of the failure of the descendants of the settlor and the ultimate gift to "proper acts of charity" was held to be valid, as these words would imply a gift to the poor, and the benefit to the poor is the prime concern of the Muslim jurists (1). A dedication of property for the benefit of the Mahomedan community on the occasions of rejoicings and mournings was held not to be void for uncertainty. It was construed with reference to the congested condition of the testator's town to mean the provision of a building for the accommodation of marriage and funeral parties (1).

*Note (2).—A bequest by a Khoja Mahomedan under a will in the English language of "a fund" to be disposed of in charity as my executor shall think fit," is not void for uncertainty (m).*

**146G. Objects partly valid and partly invalid.**—Where a wakf is created for mixed purposes, some of which are lawful and some are not, it is valid as to the lawful purposes, but invalid as to the rest, and so much of the property as is dedicated for invalid purposes will revert to the wakif (dedicator) (n).

**146H. Doctrine of cy-pres.**—Where a clear charitable intention is expressed in the instrument of wakf, it will not be permitted to fail because the objects, if specified, happen to fail, but the income will be applied for the benefit of the poor or to objects as near as possible to the objects which failed (o).

The doctrine is not applicable unless the original wakf is valid. A wakf that is void for uncertainty cannot be validated by the application of the doctrine (p).

Shia law.—The same is the rule of Shia law: Baillie, II, 216.

**147. Persons capable of making a wakf.**—Every Mahomedan of sound mind and not a minor may dedicate his property by way of wakf.

Baillie, 560. As to majority, see notes to sec. 101 above.

**148. Form of wakf immaterial.**—A wakf may be made either verbally or in writing. It is not necessary, in order to constitute a wakf, that the term "wakf" should be used in the

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| (k) <i>Hashim Ali v. Ifat Ara Hamid</i><br>gum (1942) 48 C.W.N. 561, 74<br>Cal L J 261, ('42) A.C.<br>(case under Shia Law).         | A.S. 322.<br>(1905) 10 C.W.N. 449, 484-485;<br><i>Salabhai v. Sakadu</i> (1912) 36<br>Bom. 111, 12 I.C. 702; <i>Hashim</i><br><i>Ali v. Ifat Ara Hamid Begum</i><br>(1942) 48 C.W.N. 561, 74 Cal.<br>L J 261, ('42) A.C. 180.                                |
| (l) <i>Fazal Din v. Karam Hussain</i> (1936)<br>162 I.C. 404, ('36) A.L. 81.   | (o) <i>Kuloom Bibee v. Golam Hossain</i><br>(1905) 10 C.W.N. 449, 484-485;<br><i>Salabhai v. Sakadu</i> (1912) 36<br>Bom. 111, 12 I.C. 702; <i>Hashim</i><br><i>Ali v. Ifat Ara Hamid Begum</i><br>(1942) 48 C.W.N. 561, 74 Cal.<br>L J 261, ('42) A.C. 180. |
| (m) <i>Gangbai v. Thavar</i> (1863) 1 Bom.<br>H. O. O. O. 71.  | (p) <i>Punjab Sindh Bank v. Anjuman Hy-</i><br><i>mayat Islam</i> (1935) 153 I.O. 937,<br>(‘35) A.L. 596.  |
| (n) <i>Muzhar Hussain v. Abdul</i> (1911) 33<br>All. 409, 408, 9 I.C. 753, <i>Abdul</i><br><i>Hussain Kooseji v. Sugranbai</i> ('89) |  |

grant, if from the general nature of the grant itself such a dedication can be inferred (q). Where it is not clear whether a grant constitutes a wakf, the statements and conduct of the grantee and his successors, and the method in which the property has been treated, are circumstances which, though not conclusive, are worthy of consideration (r).

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Note that the provisions of the Indian Trusts Act II of 1882 do not apply to wakfs: see sec. 1 of the Act.

Though a wakf may be created orally, yet when the terms of a dedication have been reduced to writing no evidence can be given to prove the terms except the document itself or secondary evidence of its contents (s).

**149. Wakf may be inter vivos or testamentary.**—A wakf may be created by act inter vivos or by will [s. 150].

A wakf created by will is not invalid because it contains a clause that the wakf shall not operate if a child is born to the testator. The reason is that a testator has power in law to revoke or modify his will at any time he likes, and he may therefore revoke a wakf created by will even without reserving any express power in that behalf (t).

**Shia law.**—It was held at one time that a Shia cannot create a wakf by will. But this view was erroneous, and it has been held by the Privy Council that a Shia may create a wakf by will (u).

There is a distinction between a *wakf-bil-wasiyat*, i.e., a will which conveys the property on the death of the testator to the mutawalli as wakf and a *wasiyat-bil-wakf*, i.e., a will which makes a gift of the property with a direction to the donee to create the wakf desired. The distinction is of form, not of substance. In the latter case the property is not impressed with the character of wakf immediately (v).

**150. Testamentary wakf and wakf made in death-illness.**—A Mahomedan may dedicate the whole of his property by way of wakf. But a wakf made by will or during *marz-ul-maut* cannot operate upon more than one-third of the net assets without the consent of the heirs.

*Hedaya*, 233; *Baillie*, 612.

**Shia law.**—The same is the rule of Shia law (w).

- (q) *Jewun Dass v. Shah Kubere-ood-Deen* (1840) 2 M.I.A. 390, *Naliq-un-Nissa v. Mutt Ahmad* (1903) 25 All. 418 [Shia law]; *Muhammad Hamid v. Mian Mahomud* (1923) 50 I.A. 92, 104, 4 Lah. 15, 28, 77 I.C. 1009, ('22) A.P.C. 384; *Budrul Islam Ali Khan v. Mt. Ali Begum* (1935) 16 Lah. 782, 158 I.C. 465, ('35) A.L. 251; *Raw Kup v. Saran Dayal* (1936) 160 I.C. 289, ('36) A.L. 284; *Mohammad Qasim v. Mohammad Mehdi* (1938) 13 Luck. 458, ('37) A.O. 465; *Haider Husain v. Sudama Prasad* (1940) 15 Luck. 30, (1939) O.W.N. 858, ('40) A.O. 18.
- (r) *Muhammad Raza v. Yadgar* (1924) 51 I.A. 192, 195, 51 Cal. 446, 80

- I.C. 645, ('24) A.P.C. 109
- (s) *Shahk Muhammad v. Bibi Mariam* (1929) 8 Pat. 484, 117 I.C. 638, ('29) A.P. 410
- (t) *Muhammad Akbar v. Umaradaraz* (1906) 28 All. 633, *Abdul Karim v. Shofannissa* (1908) 33 Cal. 853.
- (u) *Baqar Ali Khan v. Anjuman Ara Begum* (1902) 25 All. 236, 30 I.A. 94.
- (v) *Mahabir Prasad v. Mustafa* (1937) 41 Cal. W. N. 933, 158 I.C. 418, ('37) A.P.C. 174; *Baqar Ali Khan v. Anjuman Ara Begum* (1902) 30 I.A. 94, 25 All. 236; *Agha Ali Khan v. Altaf Hasan Khan* (1892) 14 All. 429.
- (w) *Ali Husain v. Fazal* (1914) 36 All. 481, 28 I.C. 291; *Budrul Islam Ali*

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A testamentary wakf is no more than a *bequest* to charity, and it is subject to the same restrictions as a bequest to an individual: see sec. 104 above.

**151. Wakf how completed.**—(1) A wakf inter vivos is completed, according to Abn Yusuf, by a mere declaration of endowment by the owner. This view has been adopted by the High Courts of Calcutta (x), Rangoon (y), Patna (z), Lahore (u), Madras (b), and Bombay (c), and by the Oudh Chief Court (d). According to Muhammad, the wakf is not complete unless, besides a declaration of wakf, a mutawalli (superintendent) is appointed by the owner and possession of the endowed property is delivered to him [*Hedayat*, 233; Baillie, 550]. This view has been adopted by the High Court of Allahabad (e).

(2) The founder of a wakf may constitute himself the first mutawalli (superintendent). The founder and the mutawalli being the same person, no transfer of physical possession is necessary, whichever of the two views is upheld. Nor is it necessary that the property should be transferred from his name as owner into his name as mutawalli (f). Such a transfer is not necessary even in Allahabad where the view of Muhammad prevails (g).

*Intention*—Where there is neither a declaration of wakf nor delivery of possession, a mere intention to set apart property for charitable purposes is not sufficient to create a wakf, even if the income of the property is applied to the intended purpose (h).

- Khan v Mt Ali Begum* (1935) 16 Lah 782, 158 I C 465, ('35) A L. 251
- (c) *Doe dan Jaun Beebee v. Abdollah Barber* (1838) Fenton 345, *Jinjira v. Mohammad* (1922) 49 Cal 477, 485 488, 67 I C 77, ('22) A C. 429
- (d) *Ma B Khin v. Maung Nein* (1924) 2 Rang 495, 88 I C 167, ('25) A R 71
- (e) *Muhammad Ibrahim v. Bibi Mariam* (1929) 6 Pat 484, 117 I C 638, ('29) A P 410
- (f) *Muhammad Said v. Mt Sakina Begum* (1935) 16 Lah 432, 159 I C 259, ('35) A L 626; *Zafar Hussain v. Mahomed Ghiasuddin* (1937) 18 Lah 276, ('37) A L. 552
- (g) *Patlu Kuti Umma v. Nedungadi Bank Ltd.* (1938) Mad. 118, 173 I C 699, ('37) A M 721
- (h) *Abdul Rajak v. Jimbaba* (1911) 14 Bom L R 295, 300-301, 14 I C 988, *Hussainbhai v. Advocate-General of Bombay* (1920) 22 Bom L R 846, 57 I C. 991
- (i) *Rahiman v. Bagridan* (1936) 11 Luck. 735, 100 I C. 495, ('36) A. O. 213
- (j) *Muhammad Aziz-ud-din v. The Legal Remunancer* (1893) 15 All 321; *Muhammad Yunus v. Muhammad Ishaq* (1921) 43 All. 487, 62 I C. 896, ('21) A.A. 103, *Muhammad Shaf v. Muhammad Abdul* (1927) 49 All 391, 99 I C. 1052, ('27) A A 255
- (k) *Abdul Rajak v. Jimbaba* (1911) 14 Bom L R. 295, 300, 14 I C 988, *Muhammad Rustam Ali v. Mushtaq Hussain* (1920) 47 I A. 224, 227, 42 All 609, 612, 57 I C. 329, *Hussainbhai v. Advocate-General of Bombay* (1920) 22 Bom.L R 846, 57 I C 991; *Jinjira v. Mohammad* (1922) 49 Cal 477, 488, 67 I C. 77, ('22) A.C. 429, *Abdul Jalil v. Obaid-ullah* (1921) 43 All 416, 62 I C. 725, ('21) A. A. 165; *Muhammad Zain v. Nur-ul-Hasan* (1923) 45 All. 682, 74 I C 142, ('24) A.A. 113; *Talfaqzal v. Mayad Ullah* (1924) 5 Lah. 59, 79 I C 120, ('24) A L 432, *Atunennisa Bibi v. Mohammad Abdul Rahman* (1938) A.L.J. 727, 177 I.C. 205, ('38) A A. 485.
- (l) (1923) 45 All. 682, 74 I C. 142, ('24) A.A. 113, *supra*; *Ghazanfar v. Ahmadi Bibi* (1930) 52 All. 368, 123 I.C. 369, ('30) A.A. 169; *Mahomed Abdul Aziz Khan v. Mahabub Singh* (1936) All. J. 488, 160 I C. 48, ('36) A.A. 202.
- (m) *Banubi v. Narsingrao* (1907) 81 Bom. 250; *Zafar Hussain v. Mahomed Ghiasuddin* (1937) 18 Lah. 276,

It was held in a Calcutta case (i) that if a wakf is created by a document which establishes by its terms a religious or charitable trust, and it is completed by delivery of possession it is not open to the settlor or those claiming under him to say that it was not intended to be acted upon. For, if a wakf has been created it is immaterial that it has not been acted upon as that is only a matter of breach of trust (j). But the settlor and those claiming under him are not precluded from shewing that no wakf has been created at all and that the deed was not intended to operate as a wakf, but was illusory and fictitious. This is a question of intention evidenced by facts and circumstances showing that it was not to be acted upon. For the purpose of such an enquiry subsequent conduct, if it is merely a continuation of conduct at the time of execution, is relevant (k). It has been held by the Privy Council that if a person executes a deed of wakf but without any intention of divesting himself of his ownership of the property, the real intention being to utilise the document should it become necessary as a shield against any claims that any other person might have against him either then or at any future time, the deed cannot be given effect to as a wakf (l).

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Evidence of intention is always admissible if the wakf is not created by a document (m), or, if it is created by a document, the language used is ambiguous (n). A creditor, of course, is always entitled to show that a wakf was created to defraud the creditors.

*Shafi law.*—According to Shafi law delivery of possession is not necessary to validate a wakf (o).

*Shia law.*—Under the Shia law, a wakf *inter vivos* cannot be created by a mere declaration; there must also be delivery of possession; Baillic, II, 212. Under the Shia law the wakif is entitled to constitute himself the first mutawalli and he is entitled to reasonable remuneration as a mutawalli, the ordinary rule being that he should not take more by way of salary than that which is fixed for other mutawallis (p). No delivery of possession is necessary when the wakif constitutes himself the first mutawalli, but it is necessary in that case that the character of his possession should be changed from that of owner to that of mutawalli or custodian of the wakf. Where the ordinary means of showing change of possession is mutation of names in a public register the absence of change of names is significant and important; but mutation is not for this purpose the only method nor is it necessary as to every item of the property dedicated. In any case of doubt the settlors' conduct must be regarded broadly and as a whole. But where change of possession has been effected, the settlor's actions in dealing with the property as his own will not invalidate the wakf, but amount to breaches of trust (q). If the wakf is

- (37) A.L. 552; *Rakuma Bibi v. S. Mustafa* (1938) 178 I.C. 83, (38) A.R. 284.
- (i) *Kulsoom Bibee v. Golam Hossain* (1905) 10 C.W.N. 449, 484.
- (j) *Syed Zainuddin Hussain v. Moulai Mohammad Abdur Rahim* (1933) 58 Cal.L.J. 250, 140 I.C. 799, (33) A.C. 102; *Muhammad Saif v. Mt. Sakina Begum* (1935) 16 Lab. 432, 159 I.C. 250, (35) A.L. 626.
- (k) *Masuda Khatun v. Muhammad* (1932) 59 Cal. 402, 133 I.C. 657, (32) A.C. 98; *Ebratennessa Bibi v. Sarat Ohandara* (1934) 87 Cal.W.N. 892, 150 I.C. 896, (34) A.C. 14.
- (l) *Mohammad Ali v. Mt. Biemullah Begum* (1930) 35 C.W.N. 324, 128 I.C. 647, (30) A.P.C. 255.
- (m) *Sahig Ram v. Amjad Khan* (1906) A.H.W.N. 159; *Zooloka Bibi v. Syed Zynul Abedin* (1904) 6 Bom.L.R. 1058, 1067.
- (n) *Kulsoom Bibee v. Golam Hossain* (1905) 10 C.W.N. 449, 484.
- (o) *Pathu Kuttu Umma v. Nedungudi Bank Ltd.* (1938) Mad. 148, 177 I.C. 699, (37) A.M. 791.
- (p) *Hashim Ali v. Ifat Ara Hamid Begum* (1942) 46 C.W.N. 561, 74 Cal.L.J. 261, (42) A.C. 180.
- (q) *Abadi Begum v. Kanis Zainab* (1927) 54 I.A. 38, 6 Pat. 259, 99 I.C. 669, (27) A.P.C. 2, approving *Hamid Ali v. Musawwar Hussain* (1903) 24 All. 257; *Syed Ali Zamm v. Syed Akbar Ali Khan* (1937) 64 I.A. 158, 16 Pat. 844, 41 Cal.W.N. 709, 167 I.C. 864, (37) A.P.C. 127 reversing 7 Pat. 428.

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testamentary a clear and unequivocal direction in the will dedicating specified property to God and "vesting" it in a mutawalli is sufficient (r).

**151A. Registration.**—A wakfnama by which immovable property of the value of Rs. 100 and upwards is dedicated by way of wakf requires to be registered under the Indian Registration Act, 1903, though the wakif (dedicator) may have constituted himself sole mutawalli thereof, but a "trustee-nama" by which he appoints additional mutawallis does not require registration if the document does not purport to transfer any interest in the property to them (s).

Every wakfnama, that is, a document creating a wakf, operates to *extinguish* the ownership of the wakf in the wakf property (see note to sec. 146), and therefore requires registration under sec. 17 (1) (b) of the Registration Act. This was assumed in the Privy Council case of *Mahammad Rustam Ali v. Mushtaq Husain* (t), upon which the present section (s. 151A) is founded. The facts of the case are more fully reported in 42 AL. 609, than in 47 I.A. 224. In that case the wakif first executed a wakfnama by which he constituted himself the first mutawalli, and reserved to himself the power to appoint additional mutawallis. By that document he defined the powers and duties of the mutawallis and the relation in which they were to stand to the property. After three months he executed another document called "trustee-nama," by which he appointed additional mutawallis some to act jointly with him, and others to act after his death. He died after about a month, and the suit was brought by the mutawallis to recover possession of the property from his heirs. The wakfnama was registered in fact, but it was argued for the heirs that it was not *duly* registered as certain rules made under sec. 69 of the Registration Act were contravened. The Privy Council held that it was duly registered. The "trustee-nama," however, was not registered, and it was argued that, not being registered, it did not confer upon the mutawallis any right of suit. But this argument was not accepted, and it was held that the document, even if read with the wakfnama, did not purport to assign the property to the mutawallis, and did not therefore require registration. See in this connection sec. 163B which defines the position of a mutawalli.

**152. Wakf by immemorial user.**—If land has been used from time immemorial for a religious purpose, *e.g.*, for a mosque or a burial ground then the land is by user wakf although there is no evidence of an express dedication.

Bailhe, 622

**Mosque.**—If a building has been set apart as a mosque it is enough to make it wakf if public prayers are said there with the permission of the owner. Both a mosque and a saint's tomb become wakf by user (u). If a mosque has stood for a long time and worship has been performed in it, the Court will infer that it does not stand by leave and licence of the owner of the site but that the land is dedicated property and no longer belongs to the original owner (v). A platform used as a praying place, not by the general public, but by the Mahomedan inhabitants of an "ahata" is private property and cannot be appro-

- (r) *Badrul Islam Ali Khan v. Ali Begum* (1935) 16 Lah. 782, 158 I.O. 465, ('35) A.L. 251.  
(s) *Mahammad Rustam Ali v. Mushtaq Husain* (1920) 47 I.A. 224, 42 AL. 609, 57 I.O. 329.  
(t) (1920) 47 I.A. 224, 42 AL. 609,

- 57 I.O. 329.  
(u) *Syed Maher Husain v. Hajt Ali Mahomed* (1934) 56 Bom.L.R. 526, 152 I.O. 50, ('34) A.B. 27.  
(v) *Mira v. Ram Gopal* (1935) AU.L.J. 1269, 156 I.O. 942, ('35) A.A. 391.

priated for the building of a mosque (w). In the absence of an intention to dedicate or of a dedication by the owner, user will not divest land of its private character and make it wakf (x). The construction of a mosque in a private house does not by itself mean that the public are entitled to worship there. There must be proof of dedication or of user such as by the saying of prayers in a congregational manner (y).

**Graveyard.**—The Oudh Chief Court, relying on a decision of the Allahabad High Court (z) has held that the question whether a plot of land is a grave yard or not is primarily a question of fact (a). In an earlier decision the same court took the view that the question whether a certain property is a private or public property, held in trust for religious or charitable purposes, is a mixed question of law and fact (b). In the latest case (y) it was held by the same court that whether a building is a private or public mosque is not a question of fact but a question of law. That is a question of a legal inference to be drawn from the proved facts. In *Hasansab v. Mohdinsab* (c) the Bombay High Court held that the question whether a particular building is a public mosque or not is a question of fact. The Sind Chief Court has held that whether instances of burial proved in any particular case are "adequate in character, number and extent" to justify an inference of dedication is a question of pure fact (r). It is submitted that the proper legal effect of a proved fact is essentially a question of law and the view taken by the Oudh Chief Court in the latest decision is correct and supported by the observations of the Privy Council in *Dhanna Mal v. Moti Sagar* (d). A description in a settlement register of a site as a *Lahistan* is *prima facie* evidence that it is a public graveyard in the sense known to Mahomedan law (e), and long user makes such evidence conclusive for a wakf may be established by user (f), but the mere fact of a few burials many years ago has been held to be no evidence of public user (g). In order to prove dedication by evidence of burials in a land and to justify the inference that the land is a cemetery, it is necessary to prove a number of instances adequate in character, number and extent (h). Where a certain land was used as a Mahomedan graveyard and it is amply supported by the entries in the revenue records, the mere fact that in recent years it was not so used does not deprive it of its character as a wakf (i). If a site is described in the revenue register as a grove and is owned by a Hindu zemindar the existence of a few graves will not justify the presumption of a dedication (j); for the burials must be adequate in number, character and extent to justify the inference (k). But although one burial in a plot will not make the land wakf (l) it has been held in Allahabad that the presumption is that the part of the site where the dead body is buried is dedicated with the consent

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- (w) *Mt. Nawik Devi v. Habib Ullah* (1936) A.L. 876.  
 (z) *Zafar Hussain v. Mahomed Ghavsiddin* (1937) 18 Lah. 276, (37) A.L. 552.  
 (y) *Musahab Khan v. Rafikumar Bakshi* (1938) O.W.N. 937, 177 I.O. 718, (38) A.O. 238.  
 (x) *Shevoraj Chamar v. Mudas Khan* (1934) 149 I.O. 797, (34) A.A. 868.  
 (a) *Qadir Bakhsa v. Saddullah* (1938) 173 I.O. 260, (38) A.O. 77.  
 (b) *Hari Kiaken v. Raghubar* (1926) 1 Luck. 489, 97 I.O. 853, (26) A.O. 578.  
 (c) (1923) 70 I.O. 850, (23) A.B. 42.  
 (d) (1927) 8 Lah. 573, 54 I.A. 178, (27) A.P.O. 102.  
 (e) *Ballaab Das v. Nur Mahomed* (1936) 40 Cal.W.N. 499, 70 Mad.L.J. 55, 160 I.O. 579, (36) A.P.O. 88 affirming 7 Luck. 198; *Imam Baksha Munassar Din v. Narasingh Puri* (1938) 173 I.O. 1005, (38) A.L. 246.  
 (f) *Court of Wards v. Habi Bakhsa* (1912) 40 Cal. 297, 40 I.A. 18, 17 I.O. 744; *Mehraj Din v. Ghulam* (1931) 12 Lah. 540, 134 I.O. 492, (31) A.L. 607; *Mehar Din v. Hakim Ali* (1935) 157 I.O. 561, (35) A.L. 912, *Jhao Lal v. Ahmadullah* (1934) All.L.J. 248, 149 I.O. 966, (34) A.A. 335.  
 (g) *Kaukhan Ali v. Mahomed Sharif* (1936) 161 I.O. 660, (36) A.L. 87; *Qadir Bakhsa v. Saddullah* (1938) 173 I.O. 260, (38) A.O. 77.  
 (h) *Qadir Bakhsa v. Saddullah* (1938) 173 I.O. 260, (38) A.O. 77.  
 (i) *Arur Singh v. Badar Dun* (1940) 188 I.O. 877, (40) A.L. 119.  
 (j) *Baqar Khan v. Babu Raghtindra Pratap Sahi* (1934) 9 Luck. 568, 148 I.O. 433, (34) A.O. 263.  
 (k) *Mahabir Prasad v. Mustafa* (1937) 41 Cal.W.N. 988, 163 I.O. 418, (37) A.P.O. 174.  
 (l) *Ballaab Das v. Nur Mahomed supra*;

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of the owner so that the grave is wakf and the Muslim community have access to it (m). But in the absence of evidence of user such a claim for a private grave would seem to be of doubtful validity: a Pir's tomb or a Darga is accessible to the public and proof of user would establish the nature of the institution. A public graveyard is wakf property and therefore inalienable even after it has been closed by the Municipality (n). The Muslim community has a right to require the demolition of a house built on a disused graveyard in contravention of the original purposes of the wakf (o). But the building of a temporary hut by the custodian of the graveyard does not amount to an assertion of title hostile to the wakf (p). When the land has become wakf for a graveyard, the rights of the former owner are extinguished and he has no right to graze his cattle on it (q). Private ownership of a plot is incompatible with the plot having been dedicated as a wakf for graveyards (r).

It has been held that a Hindu may dedicate a plot of land for the purpose of a Muslim graveyard (s).

**153. Revocation of wakf.**—(1) A testamentary wakf, that is a wakf made by will, may be revoked by the wakif (dedicator) at any time before his death (t) [sec. 149].

A testamentary wakf, being no more than a *bequest* for a religious or charitable purpose, may be revoked as any other bequest may be; see sec. 109 above. A wakf created during *merz-ul-maut* stands on the same footing (u); see sec. 114 above.

(2) Where at the time of creating a non-testamentary wakf, the wakif reserves to himself the power of revoking the wakf, the wakf is invalid (v).

Baillie, 565; Hedaya, 234.

**153A. Power to alter beneficiaries and to increase or reduce their shares.**—The wakif (dedicator) may, at the time of dedication, reserve to himself the power to alter the beneficiaries either by adding to their number or excluding some, and to increase or reduce their shares (w).

In the absence of such a reservation the wakif cannot alter the terms of the wakf (x) nor can he make a change in the personnel of the mutawallis (y).

- *Sufaj Ahmed Khan v. Gaya Prasad* (1939) A.L.J. 115, 189 I.C. 942, ('39) A.A. 219
- (m) *Nazira v. Sukhdarshan Lal* (1936) All I.L.J. 651
- (n) *Abdul Ghafoor v. Rahmat Ali* (1930) 122 I.C. 326, ('30) A.O. 245
- (o) *Khan Beg v. Rahmat Ali* (1934) 10 Luck 547, 152 I.O. 798, ('35) A.O. 47.
- (p) *Rauzan v. Mohammad Ahmad Khan* (1936) 165 I.C. 104, ('36) A.O. 207.
- (q) *Jhao Lal v. Ahmudallah* (1934) All I.L.J. 248, 149 I.O. 966, ('34) A.A. 335.
- (r) *Dost Mahomed v. Chaimrai* (1940) Kar 174, 187 I.O. 227, ('40) A.S. 43.
- (s) *Arur Singh v. Badar Din* (1940) 188 I.C. 877, ('40) A.L. 119 (Decision of a single Judge).
- (t) *Muhammad Ahsan v. Umaradas* (1906) 28 All. 633.
- (u) *Sayad Abdulla v. Sayad Zafn* (1889) 13 Bom 555, 560.

- (v) *Fatmabibi v. The Advocate-General of Bombay* (1882) 6 Bom. 42, 51; *Asroobas v. Noorbas* (1906) 8 Bom. L.R. 245, 250-251; *Pathukutti v. Avathalakutti* (1890) 18 Mad. 66, 73-74; *Ashna Bibi v. Awaajadi* (1917) 44 Cal. 698, 702, 37 I.C. 887; *Abdul Wahab v. Musummat General of Bombabak* (1938) 38 Bom. L.R. 18, 143 I.O. 799, ('38) A.B. 87. *Janabaki Sardar v. Sabha Khatun* (1938) 177 I.O. 307, ('38) A.C. 257.
- (w) *Ma B Khin v. Maung Sein* (1924) 2 Rang 495, 88 I.O. 167, ('25) A.B. 71; *Abdul Wahab v. Musummat Suphra* (1932) 54 All. 455, 136 I.C. 619, ('32) A.A. 248.
- (x) *Niamatunnissa v. Hafzul Rahman* (1933) 8 Luck. 482, 144 I.C. 473, ('38) A.O. 261; *Sibte Rasul v. Sibte Nabi* (1942) A.L.J. 722, ('42) A.A. 74.
- (y) *Rahman v. Bagridan* (1936) 11 Luck. 755, 160 I.O. 496, ('36) A.O. 318.

He cannot, of course, so reduce the shares as to withdraw any part of the property from the wakf. Nor can he substitute an invalid for a valid purpose, for the effect would be to withdraw so much of the property as would be appropriated for the invalid purpose.

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**154. Contingent wakf not valid.**—It is essential to the validity of a wakf that the appropriation should not be made to depend on a contingency.

A Mahomedan wife conveys her property to her husband upon trust to maintain herself and her children out of the income, and to hand over the property to the children on their attaining majority, and in the event of her death without leaving children, to devote the income to certain religious uses. This is not a valid wakf, for it is contingent on the death of the settlor, without leaving issue: *Pathukutti v. Athalakutti* (1888) 13 Mad. 66; *Cassamally v. Currimbhoy* (1911) 36 Bom. 214, 258, 12 I.C. 225, *Habib Ashraff v. Syed Fajibuddin* (1933) 144 I.C. 654, ('33) A.O. 222, Bailie, 564.

A Mahomedan executes a deed of wakf which contains a direction that until payment of specified debts due by him, no proceedings under the wakfnama should be enforceable. The provision for the payment of debts does not import a contingency and the wakf is valid: *Khalil-ud-din v. Shri Ram* (1934) 56 All. 293, 148 I.C. 294, ('34) A.A. 176.

A direction in the deed of wakf to create a reserve fund intended for preserving, improving and extending the wakf properties does not invalidate the wakf: *Hashim Ali v. Ifat Ara Hamidi Begum* (1942) 46 C.W.N. 561, 74 Cal. L.J. 261, ('42) A.C. 180.

**Shia law.**—The same is the rule of Shia law (2): Bailie, II, 218. If a widow and her sons make a dedication of their inheritance and some of the sons are minors the dedication cannot take effect at once for it depends upon the minors attaining majority and doing likewise. The wakf is therefore wholly invalid (a).

**155. Reservation of life interest for benefit of wakif (dedicator).**—(1) Under the Hanafi law, the wakif (dedicator) may provide for his maintenance out of the income of the wakf property. He may, if he wishes, reserve even the whole income for himself for his life (b).

(2) *Payment of wakif's debts.*—Under the Hanafi law, the wakif may provide for the payment of his debts out of the income of the wakf property (c).

This was well established before the Wakf Act, 1913, and it is now reproduced in sec. 3, cl. (b), of the Act. See sec. 161 below.

- (2) *Syeda Bibi v. Mughal Jan* (1902) 24 All. 251. The actual decision in this case cannot be supported since the Privy Council ruling in *Baqar Ali Khan v. Anjuman Ara Begum* (1902) 25 All. 235, 30 I.A. 94.
- (a) *Mahabir Prasad v. Mustapha* (1937) 41 Cal.W.N. 938, 168 I.O. 418, ('37) A. P.C. 174.
- (b) *Doe dem. Juton Beebe v. Abdallah* (1838) Fulton's Rep. 345; *Fatmanbib v. Advocate-General of Bombay* (1881) 6 Bom. 42, 51-52; *Cassamally v. Currimbhoy* (1912) 86 Bom.

- 214, 12 I.C. 25, *Mahomed Zain v. Nur-ud-Hasan* (1923) 45 All. 682, 74 I.C. 142, ('24) A.A. 113; *Ma E Khan v. Maung Sen* (1921) 2 Rang. 495, 88 I.O. 167, ('25) A.R. 71.
- (c) *Luchmiput v. Amur Ahum* (1882) 9 Cal. 176; *Junjira v. Mohammad* (1922) 49 Cal. 477, 483, 67 I.O. 77, ('22) A.O. 429 (a case under the Wakf Act); *Khalil-ud-din v. Shri Ram* (1934) 56 All. 293, 148 I.C. 294, ('34) A.A. 176.



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[(a) A Hanafi Mahomedan female conveys her house to her husband upon trust to pay the income of the house to her for her life, and from and after her death to devote the whole of it to certain charitable purposes. This is a valid wakf, though the charitable trust is not to come into effect until after the founder's death (d). *Hedaya*, 237. Such a wakf is not valid under the Shia law: see below "Shia law."]

(b) A Hanafi Mahomedan executes a deed of wakf by which he directs his debts to be paid out of the rents and profits of the wakf property. This is a valid wakf (e). Such a wakf is not valid under the Shia law: see below "Shia law."

(c) A Hanafi Mahomedan executes a deed of wakf by which he reserves the whole legal and beneficial interest to himself during his lifetime. The wakf is invalid (f).]

*Wakf to defraud creditors.*—A wakf made with intent to defeat or defraud creditors is voidable at the option of creditors (f).

*Provision for settlor's residence.*—It would seem that a provision for the residence of the settlor for his life in the endowed property is not invalid (g).

*Shia law.*—According to the Hanafi law, the settlor may reserve the usufruct of the endowed property for himself for his life. According to the Shia law a wakf is not valid unless the settlor divests himself of the ownership of the property and of everything in the nature of usufruct from the moment the wakf is created (h). Hence a settlor cannot, according to that law, reserve for himself a life interest in the income or any portion thereof: Baillie, II, 218-219. It has been held by the High Court of Allahabad that if the settlor reserves the whole income for himself, the wakf is wholly void; but if he reserves a portion of the income, e.g., one-third, the wakf is void as to one-third only of the corpus, but valid as to the remaining two-thirds (i). But in *Abadi Begum v. Kaniz Zannab* (j) the Privy Council expressed the opinion that in such a case the wakf would be entirely void. Their Lordships approved the four conditions governing the validity of a wakf under Shia law as set out in Baillie's Digest II 218-219. These are "(1) it must be perpetual; (2) absolute and unconditional; (3) possession must be given to the *mowkoof* (beneficiary) of the thing appropriated; and (4) it must be taken entirely out of the wakf or appropriator." The last condition had been expressed in direct and homely language by saying that the wakf must not eat out of the wakf. The case was one in which the settlor under colour of fixing her salary as mutawalli really reserved for herself a portion of the income very much in excess of the salary fixed for future mutawallis. The case was not decided on this ground but the wakf was held to be invalid as the settlor had not parted with possession so as to comply with the third condition set out above.

But though a Shia cannot provide for his own maintenance out of the wakf property he may provide for the maintenance of his family, children and dependants (k). This is recognized in sec. 3 (a) of the Wakf Act. But a Shia

(d) See cases cited in f.n. (b) above.

(e) *Phul Bee Bee v. R. M. P. Ohtettyar Firm* (1935) 13 Rang. 679, 166 I.O. 1038.

(f) *Bemuliah Begum v. Tahsin Ali* (1930) 52 All. 710, 124 I.O. 722, ('30) A.A. 402; *Hanuman Prasad v. Mahomed Ismael* (1936) 162 I.O. 495, ('36) A.L. 72; *Mohammad Ismael v. Hanuman Farehad* (1938) 178 I.C. 476, ('38) A.P.C. 290; *Nar Prasad v. Mohammad Uman* (1942) A.L.J. 645, ('43) A.A. 2.

(g) See *Muhammad Shaf v. Muhammad Abdul* (1927) 49 All. 891, at p. 395, 99 I.C. 1052, ('27) A.A. 255.

(h) *Ali Razu v. Sarwal Das* (1919) 41

All. 34, 48 I.O. 212; *Hemraj Radhanj v. Shahbhan* (1930) 179 I.O. 602, ('30) A.S. 22, affirmed in *Shahban Mohib v. Hemraj* (1941) Kar. 474, ('42) A.S. 15.

(i) *Hajee Enulab v. Mehrum Beesee* (1872) 4 N.W.P. 155; *Hamid Ali v. Mufawwar Husain* (1902) 24 All. 257.

(j) (1927) 54 I.A. 33, 6 Pat. 259, 99 I.C. 609, ('27) A.P.C. 2.

(k) 54 I.A. 33 *supra*; *Mt. Ali Begum v. Badr-ul-Islam Ali Khan* (1988) 65 A. 198, ('38) A.P.C. 164; *Sibte Rasool v. Sibte Nabil* (1942) A.L.J. 722, ('42) A.A. 74.

may provide for the expenses of Roza, Nimaz, Haj, Ziarat, etc., to be performed after his death for his spiritual benefit (l). He may also reserve a life interest for a beneficiary in the usufruct of a property if the intention that the property should become wakf on the settlor's death is clear (m). If the settlor is the first mutawalli he may lawfully take the remuneration of the mutawalli (n). The High Court of Allahabad has held that a provision that the endowment shall not take effect till the death of the settlor's wife is valid (o), but this view of the law has been overruled by the Privy Council in *Mt. Ali Begum v. Badr-ul-Islam Ali Khan* (p) in which it was held that a direction that certain property should become wakf after the death of a person surviving the testator was invalid.

Again according to the Shia law, a wakf is not valid, if it provides for the payment of personal debts of the settlor. But a provision for payment of debts charged on the estate is valid; in other words, a Shia may like a Sunni, make a valid wakf of property which is subject to a mortgage (q): Baillie, II, 218-219.

In *Syed Ali Zamin v. Syed Akbar Ali Khan* (r) the Judicial Committee held that the settlor had divested himself of all interest in the property dedicated though he had appointed himself Mutawalli with uncontrolled powers of management. Whether he has so divested himself, is a question of construction of the wakfnama, and is not to be confounded with the question whether there has been a transfer of possession or change in the character of his own possession.

**156. Wakf property cannot be alienated.**—Wakf property cannot be alienated except in the cases mentioned in secs. 168 and 169 (s).

*Hedaya*, 231, 232; Baillie, 558-560.

**157. Attachment of wakf property.**—Wakf property is not liable to attachment and sale in execution of a personal decree against the mutawalli (t), nor can the rents and profits thereof be seized in execution. See sec. 173A.

**158. Suit for a declaration that property is wakf.**—A suit for a declaration that property belongs to a wakf can be brought by Mahomedans interested in the wakf without the sanction of the Advocate-General. The provisions of sec. 92 of the Code of Civil Procedure, 1908, do not apply to such a

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(l) *Mohammad Qasim v. Mohammad Mehdi* (1938) 13 Luck. 468, ('37) A. O. 466.

(m) *Mt. Ali Begum v. Badr-ul-Islam Ali Khan* (1938) 65 I.A. 198, ('88) A.P.O. 184.

(n) *Mahabir Prasad v. Syed Mustafa Husain* (1938) 8 Luck. 346, 141 I. O. 501, ('88) A.O. 107 approved by the Privy Council on this point in (1937) 41 Cal.W.N. 988, 168 I.O. 418, ('87) A.P.O. 174.

(o) *Muhammad Ahsan v. Umaradas* (1906) 28 All. 688.

(p) (1938) 65 I.A. 198, ('88) A.P.O. 184.

(q) *Muhammad Begam v. Sikandar* (1929) 51 All. 40, 49-50, 111 I.O. 583, ('28) A.A. 516 explaining *Hamid*

*Ali v. Mujaawar* (1902) 24 All. 257, 263.

(r) (1937) 64 I.A. 158, 16 Pat. 344, 41 Cal. W. N. 709, 167 I.O. 584, ('37) A.P.O. 127.

(s) *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.O. 648, ('23) A.P.O. 44.

(t) *Bishen Chand v. Nadir Hossain* (1887) 15 Cal. 329, 15 I.A. 1; *Mutu Ramanadan v. Vava Leovai* (1917) 44 I.A. 20, 40 Mad. 116, 39 I.O. 235; *Shah Mohammad v. Mohammad* (1927) 2 Luck. 109, 100 I. O. 241, ('27) A.O. 113; *Muhammad Imshai v. Muhammad* (1921) 48 All. 508, 62 I.O. 804, ('21) A.A. 224.

**S. 158** suit. That section applies only to suits claiming any of the reliefs specified in it (u).

### *Family Settlements by way of Wakf.*

**History of the Wakf Act.**—In order to understand what follows, wakfs may be divided into two classes, viz., (1) public and (2) private. A public wakf is one for a public religious or charitable object. A private wakf is one for the benefit of the settlor's family and his descendants, and is called *wakf-alal-awlad*. It was considered at one time that "to constitute a valid wakf there must be a dedication of property *solely* to the worship of God or to religious or to charitable purposes" (v), in other words, that a private wakf was in no case valid. But this extreme view is no longer tenable (w), and a private wakf may now be made subject to certain limitations. These limitations were very strict under the law as it stood before the Wakf Act of 1913. They have been considerably relaxed by the Wakf Act. It will be convenient to consider private wakfs under two distinct heads.

A. Wakf *exclusively* for the benefit of the settlor's family, children, and descendants in perpetuity.—Such a wakf was invalid before the Wakf Act. It is also invalid under that Act: see Wakf Act, proviso to sec. 3 reproduced in sec. 161 below.

B. Wakf *both* for the benefit of the settlor's family, children, and descendants, *and* for charity.—According to the Privy Council decisions before the Wakf Act, such a wakf was valid if there was "a *substantial* dedication of the property to charitable uses at some period of time or other" (x). But if the primary object of the wakf was the aggrandizement of the family, and the gift to charity was illusory whether from its small amount or from its uncertainty and remoteness, the wakf for the benefit of the family was invalid and no effect could be given to it. The leading case on the subject was *Abdul Fata Mahomed v. Rasamaya* (y), decided in 1894 [see ill. (d) to sec. 159 below]. Under the Wakf Act, a wakf for the benefit of the family is valid, even if the gift to charity is illusory. All that is necessary under the Act is that there should be an ultimate gift to charity. See Wakf Act, sec. 4, reproduced in sec. 161 below.

In *Abul Fata Mahomed's* case referred to above, the income of the wakf property was to be applied in the first instance for the benefit of the settlor's descendants from generation to generation, and the trust in favour of charity was not to come into operation *until after the extinction of the whole line of the settlor's descendants*. Their Lordships of the Privy Council held that the gift to charity was illusory, and that the sole object of the settlor was to create a family settlement in *perpetuity*, and that the provision for the settlor's family was therefore invalid. In the course of the judgment their Lordships said (p. 681):—

"As regards precepts, which are held up as the fundamental principles of Mahomedan law [see S. 24], their Lordships are not forgetting how far law and religion are mixed up together in the Mahomedan communities; but they asked during the argument how it comes about that by the general law of Islam, at least as known in India, simple gifts [*hiba*] by a private person to remote

(u) *Abdur Rahim v. Mahomed Barkat Ali* (1928) 55 I.A. 96, 55 Cal. 519, 108 I.C. 361, ('28) A.P.O. 16.

(v) *Abdul Ganne v. Hussein Miya* (1873) 10 Bom.H.C. 7; *Mahomed Hamidulla v. Lotful Huq* (1881) 6 Cal. 744.

(w) *Luchmiput v. Amir Alum* (1882) 9 Cal. 178; *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I.A. 28.

(x) *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 509, 17 I.A. 28, 27.  
(y) (1894) 22 Cal. 619, 22 I.A. 78.

unborn generations of descendants, successions that is of inalienable life-interests, are forbidden; and whether it is to be taken that the very same dispositions, which are illegal when made by ordinary words of gift, become legal if only the settlor says that they are made as *wakf* in the name of God, or for the sake of the poor. To those questions no answer was given or attempted, nor can their Lordships see any."

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The decision of the Privy Council in *Abul Fata Mahomed's* case caused considerable dissatisfaction in the Mahomedan community in India. It can hardly be doubted that under the pure Mahomedan law a wakf exclusively for the benefit of the settlor's family and descendants was valid. Such a settlement may be one in favour of *unborn persons*; for it may create successive life-interests in favour of such persons; it may be "a perpetuity, of the worst and most pernicious kind," but it was recognized by Mahomedan law. The Privy Council, however, held that such a wakf was invalid. A representation was thereupon made to the Government of India with the result that an Act was passed in 1913, called the Mussalman Wakf Validating Act, the object being to remove the disability created by that decision. But it was held as to this Act that it was not retrospective, that is to say, it did not apply to wakfs created before the Act. This led to the enactment of another Act in 1930, by which a retrospective effect was given to the Wakf Act of 1913. The result is that the Wakf Act of 1913 now applies also to wakfs created before that Act: see sec. 162 below. We now proceed to state in the form of propositions the law before the Wakf Act and the law as laid down by that Act.

**159. Law relating to private wakfs before the Mussalman Wakf Validating Act, VI of 1913.**—Under the law before the Wakf Act of 1913, a wakf was valid if the effect of the deed of wakf was to give the property in substance to charitable uses. It was not valid if the effect was to give the property in substance to the testator's family (z).

**Shia law.**—The same was held as to Shia wakfs (a).

[(a) A Mahomedan conveys property to a mutawali, *A. B.*, with a direction to defray out of the profits of the endowed land the expenses of a mosque, to give alms to mendicants, to educate poor students, and to utilize the surplus for the marriages, burials, and circumcision of the members of *A. B.*'s family. Here there is a substantial dedication to charity; the wakf, therefore, is valid: *Muzhurool Huq v. Puhraj* (1870) 13 W.R. 235; *Deoki Prasad v. Inait Ullah* (1892) 14 All. 375.

(b) *A* executes a document purporting to settle property as "wakf" for the benefit of his wife, daughter, and descendants of the daughter. The deed does not contain any provision for the application of the income in the event of the family becoming extinct. This is not a valid wakf under the law before the Wakf Act, as there is no gift to charity: *Nizamudn v. Abdul Gafur* (1888) 13 Bom. 264, affirmed on appeal by the Privy Council, sub-nomine *Abdul Gafur v. Nizamudn* (1892) 17 Bom. 1, 19 I.A. 170; *Abdul Ganne v. Hussan Miyo* (1873) 10 Bom. H.C. 7. Nor is it a valid wakf under the Wakf Act, for there is no ultimate gift to charity. See sec. 160, note (3).

(c) A Mahomedan executes a document purporting to be a *wakfnama* which begins with a dedication of his entire property for the purpose of supporting a mosque and two schools, and for *sadr ward*. The dedication is qualified by the

(a) *Mutu Ramanadan v. Yava Lervet* (1916) 44 I.A. 21, 26-27, 40 Mad. 116, 39 I.O. 235, ('16) A.P.O. 86. (a) *Hamid Ali v. Mufawar Hussain* (1902) 24 All. 257.

- S. 159** words "in the manner provided by the following paragraphs," and these paragraphs contain provisions for the appointment of the settlor's sons and descendants as mutawallis and for their salary, and for the maintenance and support of his family and descendants from generation to generation. The only provision in the deed as to religious and charitable purposes is that the mutawallis should continue to perform them according to custom, and this requires a very small expenditure compared to the income. The effect of the deed, as a whole, is that while it professes to dedicate as wakf property bringing in an annual income of about Rs. 12,000, it leaves it to the members of the family who as mutawallis are to retain the control and management, to spend a small amount for religious purposes, and to take as much as they like for themselves and the members of the family, for all time on account of salary as maintenance. This is not a valid wakf under the law before the Wakf Act, for the main purpose of the settlement is the aggrandizement of the settlor's family, and the gift to charity is illusory: *Mahomed Ahsanulla v. Amarchand Kundu* (1889) 17 Cal. 498, 17 I.A. 28; *Mujib-un-nissa v. Abdur Rahim* (1900) 23 All. 233, 28 I.A. 15 [where the income to be devoted to charity was left entirely to the discretion of the mutawalli for the time being]; *Muhammad Munawar v. Raza Bibi* (1905) 27 All. 320, 32 I.A. 86; *Fazlur Rahim v. Mahomed Obedul* (1903) 30 Cal. 666; *Balla Mal v. Ata Ullah Khan* (1927) 54 I.A. 372, 9 Lah. 203, 193 I.C. 518, (1927) A.P.C. 191 [annual income Rs. 1,558—Rs. 146 per annum to be applied to charity and the rest to go to settlor's descendants—wakf held to be invalid]; *Bukeya Banu v. Najira Banu* (1928) 55 Cal. 448, 105 I.C. 647, (1928) A.C. 130, [annual income Rs. 10,000—Rs. 456 per year to be applied to charity and the rest to go to settlor's descendants—wakf held to be invalid]. [All these would constitute a valid wakf under the Wakf Act.]

*Note*.—In *Mahomed Ahsanulla's case* (pp. 38-39) their Lordships of the Privy Council observed: "If indeed it were shown that the customary uses were of such magnitude as to exhaust the income or to absorb the bulk of it, such a circumstance would have its weight in ascertaining the intention of the grantor." Accordingly, where a Mahomedan dedicated property, of which the average annual income was Rs. 850, for the purpose of performing *fateha* and *kadam sharif* ceremonies, and it was found that according to the custom prevailing in the country the amount required for the ceremonies was Rs. 500 per annum, it was held by the High Court of Allahabad that the dedication to religious purposes was substantial, and that the wakf was therefore valid: *Phul Chand v. Akbar Yar Khan* (1896) 19 All. 211.

(d) Two Mahomedan brothers executed a deed purporting to make a wakf of all their immovable property for the benefit of their children and their descendants from generation to generation, and, on total failure of all their descendants, for the benefit of widows, orphans, beggars and the poor. The provision for the settlor's children and their descendants is void according to the law before the Wakf Act, for the gift to the poor is too remote, and it is not to take effect until the total extinction of all the descendants of the settlor: *Abul Fata Mahomed v. Rasamaya* (1894) 22 Cal. 619, 22 I. A. 76. [Such a wakf is valid under the Wakf Act—see sec. 4 of the Act reproduced in sec. 161 below.]

In the above case their Lordships of the Privy Council said: (p. 89) "If a man were to settle a crore of rupees, and provide ten for the poor, that would be at once recognized as illusory. It is equally illusory to make a provision for the poor under which they are not entitled to receive a rupee till after the total extinction of a family: possibly not for hundreds of years; possibly not until the property had vanished away under the wasting agencies of litigation or misfeasance or misfortune; certainly not as long as there exists on the earth one of those objects whom the donors really cared to maintain in a high position.

Their Lordships agree that the poor have been put into this settlement merely to give it a colour of piety, and so to legalize arrangements meant to serve for the aggrandizement of a family."

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(e) Two Mahomedan brothers execute a deed whereby they settle lands of the value of Rs. 20,000 in trust to apply an indeterminate portion of the income for the due performance of customary *fatcha* for ancestors and to almsgiving, and to apply the residue of the income in perpetuity for the benefit of the settlor's sons and their descendants without power of alienation. The amount required for *fatcha* and almsgiving is estimated by the Court at Rs. 600 per annum. The total income of the trust estate is estimated at Rs. 1,500, leaving a balance of Rs. 900 for the benefit of the settlor's descendants. It was held by their Lordships of the Privy Council that though two-fifths of the income was to be devoted to the charity, and three-fifths was to go to the family, the effect of the deed was to give the property in substance to charitable uses, and that the deed was therefore valid. Their Lordships said: "But these figures may vary. They are not fixed and unalterable. The income may fluctuate or decrease permanently, and needs of the charity may expand even. . .

The paramount purpose of the grantors was evidently to provide for all the needs of these charities up to the limit of the trust funds, the income received from the land. Those needs are the first burden upon that income. It is the residue, which may be a dwindling sum, that is given to the family. The contention that, because the share of the income going to the family is at present larger than that going to the charities, the effect of the deed is so to give the property in substance to the family, and that therefore it is invalid as a deed of wakf, is, their Lordships think, entirely unsound": *Mutu Ramana-dan v. Vava Levan* (1917) 44 I.A. 21, 40 Mad. 116, 39 I.C. 235, ('16) A.P.C. 86.]

*Family settlement based on invalid wakf.*—A executes a deed of wakf. After A's death some of his heirs bring a suit against the mutawalli and the other heirs to set aside the wakf on the ground that the gift to charity is illusory. The suit is compromised and an agreement is made whereby the members of the family agree that the wakf is binding and that allowances fixed thereunder should be paid out of the income of the endowed property to named members of the family, and upon the death of any of the named persons, to his heirs. The agreement, being for consideration, is enforceable as constituting a valid charge upon the property, although the wakf is invalid (b).

*Effect of Shariat Act.*—Sec. 2 of the Shariat Act expressly makes the Muslim personal law applicable *inter alia* to wakfs. The result is that Mussulman law is expressly made applicable to wakfs whereas previously the law relating to wakfs had to be decided on principles of equity and good conscience under the terms of the Acts and Regulations which have been in part repealed by the Shariat Act. There is nothing in the Shariat Act to affect the Privy Council decisions previous to Mussulman Wakf Validating Act as they expressly interpret what was held to be the Mussalman law on the subject of wakfs (c).

**160. Law relating to private wakfs under the Mussalman Wakf Validating Act, VI of 1913.**—(1) It is now declared by the Mussulman Wakf Validating Act that it is lawful for a person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of the Mussalman law, for the following among other purposes:—

(b) *Khajeh Solehman v. Nawab Sir Sah-mullah* (1922) 49 I.A. 159, 49 Cal. 620, 69 I.C. 138, ('22) A. P.C. 107

(c) *Mahmuddin Ahmed v. Sofa Khatoon* (1940) 2 Cal. 464, 44 O.W.N. 974, 192 I.C. 693, ('40) A. C. 501.

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- (a) for the maintenance and support wholly or partially of his family, children or descendants, and
- (b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated [see s. 155 above].

Provided that the ultimate benefit is in such cases expressly or impliedly reserved for the poor or for any other purpose recognized by the Mussalman law as a religious, pious or charitable purpose of a permanent character.

This is sec. 3 of the Wakf Act.

(2) No such wakf is to be deemed to be invalid merely because the ultimate benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants, of the person creating the wakf.

This is sec. 4 of the Wakf Act.

*Note* (1).—A wakf may be created for the support of the "family" [Wakf Act, s. 3 (a)]. The term "family" includes a daughter-in-law (d) and has also been held to include an adopted son who has resided with the settlor as a dependent relation (e). It is not confined to persons who are dependent for their maintenance on the wakif. It has accordingly been held that the son of a half-brother, the son and grandson of a paternal uncle, and the son of a half-sister, though not dependent on the wakif for their maintenance and residing separately from him, are included in the term "family" (f). A sister's son who resides with the wakif and is maintained by him is also a member of the family (g). A provision for the maintenance of the settlor's nephews and of their descendants generation after generation has also been held to be valid (h). A valid wakf can be created in favour only of some members of the family or of some of the children or descendants whether males or females and to the exclusion of others (i). But if there is no provision for the maintenance of the family a wakf for a solely religious purpose, though valid as a wakf, is outside the Act even though the founder's daughter-in-law and after her, her daughter are appointed mutawallis with a remuneration (j). It has been held by the Calcutta High Court that if the ultimate gift to charity be postponed till after the extinction of the family, children or descendants of the wakif, the wakf would be valid, but if it is to take effect on the extinction of the heirs how low soever, the wakf would be invalid (k).

- (d) *Musharraf Begum v. Sikandar* (1929) 51 All. 40, 111 I.O. 583, ('28) A.A. 518.
- (e) *Mubarak Ali v. Ahmad Ali* (1935) 158 I.C. 149, ('35) A.L. 414.
- (f) *Imdad Ali v. Ashiq Ali* (1929) 4 Luck. 101, 113 I.O. 494, ('29) A.O. 25.
- (g) *Ismail Haji Arat v. Umar Abdulla* (1942) 44 Bom.L.R. 256, ('42) A.B. 155.
- (h) *Ghazanfar v. Ahmadi Bibi* (1930) 52 All. 368, 123 I.O. 369, ('30) A.

- A. 169; *Badrul Islam Ak Khan v. Mt. Ak Begum* (1935) 16 Lah. 762, 153 I.O. 465, ('35) A.L. 251.
- (i) *Mt. Mubarak Jan v. Mt. Tej Begum* (1933) 19 Lah. 435, 177 I.O. 439, ('33) A.L. 453.
- (j) *Rahiman Begum v. Baqiridan* (1936) 11 Luck. 735, 160 I.O. 495, ('36) A.O. 213.
- (k) *Moktuddin Ahmed v. Sofia Khatun* (1940) 2 Cal. 464, 44 O.W.N. 974, 192 I.O. 698, ('40) A.O. 501.

*Note (2).*—The ultimate gift must be one for a religious, pious or charitable purpose (1) [Wakf Act, s. 3, proviso]. It is not necessary, as it was under the law before the Act, that there should also be a concurrent gift to charity. Under the Act a Mahomedan need not provide for any gift to charity until after the extinction of the whole line of his descendants. This is in accordance with the view of Mahomedan law taken by West, J., in *Fatma Bibi v. The Advocate-General* (m), by Farran, J., in *Amrullah v. Shauk Hussain* (n), and by Ameer Ali, J., in *Bikani Mia v. Shuk Lal* (o). In the first of these cases, West, J., said: "If the condition of an ultimate dedication to a pious and unfailling purpose be satisfied, a wakf is not made invalid by an intermediate settlement on the founder's children and their descendants. The beneficiaries successively take, may constitute a perpetuity in the sense of the English law; but according to the Mahomedan law, that does not vitiate the settlement, provided that ultimate charitable object be clearly designated." It will be remembered that the view taken by West, J., Farran, J., and Ameer Ali, J., was disapproved by the Privy Council in *Abul Fata Mahomed v. Rasamaya* (p) See ill. (d) to sec. 159.

*Note (3).*—The ultimate gift to charity may be an "implied" gift; it need not be express [Wakf Act, s. 3, proviso]. What does "implied" mean? In a case where there was no express disposition of the ultimate benefit, the Allahabad High Court implied an ultimate benefit for charity, from intention of the founder as disclosed by the terms of the deed, from the fact that there was a provision for charity and from the fact that the wakf was to be perpetual, although the founder contemplated the possible extinction of his descendants (q). According to Abu Hanifa and Muhammad, it is necessary for a wakf to be complete that the ultimate benefit for the poor should be expressly reserved. According, however, to Abu Yusuf, such benefit may be reserved impliedly, and this can be done by the mere use of the word "wakf." Thus according to Abu Yusuf, if a person simply says "I give this land by way of wakf to Zeyd," the wakf is complete, and Zeyd has the usufruct for his life, and after his death, the income will go to the poor, though the poor are not expressly mentioned (r). The *Fatawa Alamgiri* declares a preference for the opinion of Abu Yusuf (s). In the first case cited in ill. (b) to sec. 159, the High Court of Bombay held that the opinion of Abu Hanifa and Muhammad was to be preferred to that of Abu Yusuf, and it accordingly held that in the absence of an ultimate gift to charity, the deed was not valid as a wakf. This decision was upheld by the Privy Council on appeal (t). Is it intended by the word "impliedly," which appears in sec. 3 of the Wakf Act, to give effect to the opinion of Abu Yusuf, so that an ultimate gift to charity may be implied, even where none is named from the mere use of the word "wakf"? It has been held in Allahabad (u), Calcutta (v), and Oudh (w), that it is not to be so implied. A similar view has been taken by the Privy Council (x).

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- (1) *Ghulam Mohammad v. Ghulam Hussain* (1932) 59 I. A. 74, 54 All. 93, 186 I. O. 454, ('32) A. P. C. 81; *Abul Hasan v. Rajbir* (1931) A. O. 124, 131 I. O. 433; *Phul Bai Beg v. R.M.P. Chettyar Fvrm* (1935) 13 Rang. 679, 156 I. C. 1038  
(m) (1881) 6 Bom. 42, 53  
(n) (1887) 11 Bom. 492.  
(o) (1893) 20 Cal. 116, 132-177.  
(p) (1894) 22 Cal. 319, 22 I. A. 76.  
(q) *Baga Ullah Khan v. Ghulam Siddique Khan* (1935) All. L. J. 647, 155 I. C. 416, ('35) A. A. 616.  
(r) *Hedaya*, p. 234.  
(s) *Baillie's Digest*, p. 558.  
(t) *Abdul Gafur v. Nizamuddin* (1892) 17 Bom. 1, 19 I. A. 170.  
(u) *Irfan Ali v. Official Receiver* (1930) 52 All. 748, 130 I. O. 681, ('30)

- A. A. 837; *Mt. Raghuva Begum v. Saraj-mal* (1936) All. L. J. 231, 163 I. O. 344, ('36) A. A. 404  
(r) *Mariada Khanum v. Mohammad* (1932) 59 Cal. 402, 412-414, 133 I. C. 657, ('32) A. O. 93; *Tahiruddin Ahmed v. Makhuddin Ahmed* (1933) 60 Cal. 901, 37 Cal. W. N. 741, 147 I. O. 196, ('33) A. O. 716; *Mahomed Ali v. Dinshah Chandra Roy* (1940) 2 Cal. 189, 44 O. W. N. 718, ('40) A. O. 417.  
(w) *Sheikh Ramzan v. Musammat Rahmani* (1932) 7 Luck. 300, 135 I. O. 372, ('32) A. O. 71.  
(x) *Ghulam Mohammad v. Ghulam Hussain* (1932) 59 I. A. 74, 86 (see the argument of counsel), 54 All. 93, 136 I. O. 454, ('32) A. P. C. 81.



**ss.** *Religious, pious or charitable purpose.*—It is not sufficient to use these general words but the particular purpose must be specified (y).

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*Family settlement.*—As in the case of wakfs under the law before the Act a wakf which is invalid as a wakf may yet be binding on the parties as a family settlement (z).

**Shia wakfs.**—The Wakfs Act applies to Shias also, except sec. 3 (b).

**161. Text of the Mussalman Wakf Validating Act, 1913.**—  
The following is the text of the Wakf Act VI of 1913, which came into force on 7th March, 1913:—

An Act to declare the rights of Mussalman to make settlements of property by way of "wakf" in favour of their families, children and descendants.

Whereas doubts have arisen regarding the validity of wakfs erected by persons professing the Mussalman faith in favour of themselves, their families, children and descendants and ultimately for the benefit of the poor or for other religious, pious or charitable purposes; and whereas it is expedient to remove such doubts; It is hereby enacted as follows:—

1. (1) This Act may be called the Mussalman Wakf Validating Act, 1913.

(2) It extends to the whole of British India.

2 In this Act unless there is anything repugnant in the subject or context,

(1) "Wakf" means the permanent dedication by a person professing the Mussalman faith of any property for any purpose recognized by the Mussalman law as religious, pious or charitable (a).

(2) "Hanafi Mussalman" means a follower of the Mussalman faith who conforms to the tenets and doctrines of the Hanafi school of Mussalman law.

3. It shall be lawful for any person professing the Mussalman faith to create a wakf which in all other respects is in accordance with the provisions of Mussalman law (b), for the following among other purposes:—

(a) for the maintenance and support wholly or partially of his family (c), children or descendants, and

(b) where the person creating a wakf is a Hanafi Mussalman, also for his own maintenance and support during his lifetime or for the payment of his debts out of the rents and profits of the property dedicated (d).

Provided that the ultimate benefit (e) is in such cases expressly or impliedly (f) reserved for the poor or for any other purpose recognized by the

(y) *Punjab Sind Bank v. Anjuman Himmayat Islam* (1935) 158 I.O. 937, ('35) A.L. 596.

(z) *Lati'unnissa v. Naimuddin* (1935) 156 I.C. 609, ('35) A.A. 856; *Sekender Ali v. Sadruddin Bhuniya* (1935) 40 Cal. W.N. 174, 159 I.O. 1008, ('85) A.C. 792; *Mohammad Irfan Ali Khan v. Mohammad Tabis Ali Khan* (1933) All.L.J. 97, 147 I.C. 178, ('33) A.A. 277 following *Mahomed Ahsanulla v. Amar-*

*chand Kundu* (1889) 17 I.A. 28, 17 Cal. 498.

(a) See s. 146D.

(b) See ss. 146 to 154.

(c) As to meaning of "family" see note (1) to s. 160 above.

(d) This is not new. It is in accordance with the law as settled before the Act. See s. 155 and notes thereto.

(e) See note (2) to s. 160 above.

(f) See note (3) to s. 160.

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4. No such wakf shall be deemed to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature is postponed until after the extinction of the family, children or descendants of the person creating the wakf.

Saving of local and sectarian custom.

5. Nothing in this Act shall affect any custom or usage whether local or prevalent among Mussalmans of any particular class or sect.

**162. Wakf Act of 1913 has now retrospective effect.**—The Wakf Act of 1913 came into force on the 7th March, 1913. It was held not to be retrospective, that is to say, that it did not apply to wakfs created before that date (g). To give it retrospective effect, an Act was passed in 1930, called the Mussalman Wakf Validating Act, 1930 (XXXII of 1930). It came into force on the 25th July, 1930. The effect of it is that the Wakf Act of 1913 applies also, from and after the 25th July, 1930, to wakfs created before the 7th March, 1913.

**163. Succession among descendants.**—Where a wakf is made for the benefit of the settlor's descendants, but no rules of succession are laid down in the deed of wakf, the descendants take *per stirpes*, and not *per capita* (h), and males and females take equal shares (i).

**163A. Forfeiture of interest under Wakfnama on remarriage of widows.**—A condition in a deed of wakf that the interest given by the deed to a widow or to the wife of a beneficiary shall be forfeited on her remarriage is not invalid (j).

*Of Mutawallis or Managers of Wakf property.*

**163B. Mutawalli.**—Under the Mahomedan law the moment a wakf is created all rights of property pass out of the wakif and vest in the Almightly. The mutawalli has no right in the property belonging to the wakf; the property is not vested in him, and he is not a trustee in the technical sense. He is merely a superintendent or manager (k). The admis-

(g) *Khajeh Solehman v. Nawab Sir Sah-mullah* (1922) 49 I.A. 153, 49 Cal. 820, 69 I.O. 138, ('22) A.P.C. 107; *Balla Mal v. Ata Ullah Khan* (1927) 54 I.A. 372, 9 Lah. 203, 108 I.O. 518, ('27) A.P.C. 191.  
(h) *Macnaghten*, 341; *Sayad Mahomed v. Sayad Gobar* (1881) 6 Bom. 88, 90-91.  
(i) *Macnaghten*, 342; *Baillie*, 553 *et seq.* See *Abdul Ganne v. Hussan Mtya*

(1873) 10 Bom H.C. 7 at p. 14; *Shekh Karmedin v. Nawab Mir Sayad* (1885) 10 Bom. 119.  
(j) *Latafatunnisa v. Shaharbanu* (1932) 139 I.O. 292, ('32) A.O. 108.  
(k) *Vidya Varuthi v. Balusami* (1921) 48 I.A. 302, 312, 44 Mad. 831, 66 I.O. 161, ('22) A.P.C. 123; *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 90, 50 Cal. 329, 71 I.O. 640, ('23) A.P.C. 44;

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*Suit for a declaration.*—A mutawalli may sue in his personal capacity for a declaration that he is mutawalli without suing for possession (l).

*Suit for possession.*—A mutawalli is entitled to sue for possession, though the property is not vested in him (m). Limitation is under Art. 142 from the date of dispossession and Art. 134 does not apply (n). If the mutawalli's name has been recorded as a co-sharer, he is entitled under sec. 226 of the Agra Tenancy Act, 1926, to sue the lambardar for his share of the profits (o).

*Appointment of mutawalli by arbitration.*—The office of mutawalli of a public wakf, being in the nature of a public office, the question as to which of two persons is entitled to be mutawalli cannot be referred to arbitration (p). But where A claims that certain property is wakf property and that he is the mutawalli thereof, and B denies that the property is wakf property, an award made by an arbitrator that each shall be entitled to an equal share in the management and profits of the property until the matter is decided by the Court, is perfectly valid (q).

*Superintendent or manager.*—Although the wakf property is not vested in the mutawalli he has the same rights of management as an individual owner. He is not bound to allow the use of the wakf property for objects which though laudable in themselves are not objects of the wakf. The Muslim community cannot compel the mutawalli of a mosque to allow a school building to be erected on a site attached to the mosque (r). Again although a mutawalli is not a trustee in the sense in which the expression is used in English law he has duties akin to those of a trustee and if he wrongfully deprives a beneficiary of the profits he is liable for interest in cases in which, under sec. 23 of the Trusts Act, a trustee would be liable (s). It has even been said that in the case of a private wakf (i.e., a wakf for the family of the founder where only the ultimate benefit is reserved to charity) the mutawalli is not a mere superintendent or manager but is "practically speaking the owner" (t)—*sed quare*.

**164. Who may be appointed mutawalli.**—(1) Subject to the provisions of sub-sec. (2), the founder of a wakf may appoint himself (u), or his children and descendants (v), or any other person, even a female (w), or a non-Mahomedan (x), to be mutawalli of wakf property.

- Saadat Kamel Hanum v. Attorney General, Palestine* (1939) 183 L. C. 161, ('39) A.F.C. 185; *Dase Eui v. Lave Chan Tha* (1940) Rang. 136 186 I.C. 210, ('39) A.R. 965  
(k1) *Sibte Rasul v. Sibte Nabi* (1942) A.L.J. 722, ('43) A.A. 74  
(l) *Muhammad Jafar v. Muhammad Taq. Khan* (1934) 9 Luck. 170, 145 L. O. 1003, ('33) A.O. 517  
(m) See (k).  
(n) *Wahid Ali v. Mahboob Ali Khan* (1936) 11 Luck. 297, 156 I.C. 92, ('35) A.O. 425  
(o) *Muhammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926, ('33) A.A. 407.  
(p) *Muhammad Ibrahim v. Ahmad* (1910) 32 All. 503, 6 I.C. 219.  
(q) *Mozzam v. Raza* (1924) 46 All. 856, 61 I.C. 851, ('24) A.A. 818  
(r) *Syed Ahmed v. Hafiz Sahad* (1934) 153 I.C. 1095, ('34) A.A. 782.  
(s) *Kushwar v. Zafar* (1933) 55 All. 164, 146 I.C. 733, ('33) A.A. 186  
(t) *Muhammad Qamar v. Salamat Ali* (1933) 55 All. 512, 147 I.C. 926, ('33) A.A. 407.  
(u) *Bailie, 601; Hedaya, 238; Bailie, II, 214; Advocate-General v. Fatima* (1872) 9 B.H.O. 19; *Abdul Rajak v. Junbaba* (1911) 14 Bom.L.R. 295, 14 I.C. 988; *Muhammad Rustam Ali v. Mushtaq Hussain* (1920) 47 I.A. 234, 42 All. 609, 57 I.C. 329.  
(v) *Bailie, 601.*  
(w) *Bailie, 601; Wahid Ali v. Ashraf Hossein* (1882) 8 Cal. 732, *Nahab Bano v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Munnawar Begam v. Mir Mahapatil* (1918) 41 Mad. 1033, 51 I.C. 489; *Syed Abdul Hameed v. Syed Unnissah Bibi* (1934) 67 Mad.L.J. 907, 153 I.C. 630, ('34) A.M. 692  
(x) *Answer Ali, 4th Ed. Vol. 1, p. 446*

But where the mutawalli has to perform religious duties or spiritual functions which cannot be performed by a female, *e.g.*, the duties of a *sajjadanashin* (spiritual superior) (*y*) [s. 175], or *khatib* (one who reads sermons), or *majavar* of a *dargah* (*z*), or an *imam* in a mosque (whose function it is to lead the congregation) (*a*), a female is not competent to hold the office of mutawalli, and cannot be appointed as such (*b*). Similar remarks apply to non-Mahomedans.

(2) Neither a minor nor a person of unsound mind can be appointed mutawalli (*c*). But where the office of mutawalli is hereditary and the person entitled to succeed to the office is a minor, or where the mode of succession to the office is defined in the deed of wakf and the person entitled to succeed to the office on the death of the first or other mutawalli is a minor, the Court may appoint another mutawalli to act in his place during his minority (*d*).

*Female as mutawalli.*—The Privy Council have said that there is no legal prohibition against a woman holding a mutawalliship when the trust by its nature involves no spiritual duties such as a woman could not discharge in person or by deputy (*e*). In a case where a woman was the founder of a wakf for a mosque and other religious and charitable purposes, and appointed herself first mutawalli; and directed that two male relations should be mutawallis after her; and then directed that their legal heirs should succeed as mutawallis—the Calcutta High Court held that the expression legal heirs did not exclude female heirs (*f*). The Madras High Court has held that a woman can be appointed head mujawar of an astan or platform where nohurrani ceremonies are performed (*g*). The Court observed that the rule of exclusion did not apply if the religious duties were such as could be performed by deputy. The Bombay High Court has also taken the view that in the absence of any usage a woman can be appointed a mujawar (*h*). The Madras High Court has held that a woman in the Nellore District is not disqualified from holding the office of khatiba (*i*). In a Bombay case it was considered that religious duties cannot be performed by proxy and it was accordingly held that a female is excluded from succession

(y) *Kanis v. Sayid* (1923) 2 Pat. 819, 77 I.C. 209, ('28) A.P. 576

(z) *Hussain Beebee v. Hussain Sherif* (1868) 4 M.H.C. 28; *Ibrahimbi v. Hussain Sherif* (1880) 3 Mad. 95. As to dargah, see *Piran v. Abdul Karim* (1891) 19 Cal. 203; *Mahomed Osman v. Essak Sale-mahomed* (1937) 89 Bom.L.R. 502.

(a) See *Munnawaru Begum v. Mir Mah-pallik* (1918) 41 Mad. 1038, 1038, 51 I.C. 489.

(b) *Kanis v. Sayid* (1923) 2 Pat. 819, 77 I.C. 209, ('28) A.P. 576. See also *Munnawaru Begum v. Mir Mah-pallik* (1918) 41 Mad. 1038, 51 I.C. 489, and *Ismailiya v. Wah-dani* (1911) 86 Bom. 308, 14 I.C. 469.

(c) *Baillie, 601*; *Piran v. Abdul Karim* (1891) 19 Cal. 203, 219-220, *Syed Hasan v. Mir Hasan* (1917) 40 Mad. 941, 38 I.C. 528; *Kanis v. Sayid* (1923) 2 Pat. 819, 77 I.C. 209, ('28) A.P. 576.

(d) (1891) 19 Cal. 203, 220, *supra*; *Ejns*

*Ahmad v. Khatun Begum* (1917) 39 All. 288, 37 I.C. 885; *Bibi Zohra v. Bibi Habibunnisa* (1938) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9.

(e) *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118; *Muham-mad M. Hussain v. Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

(f) *Wares Ali v. Sheikh Shamsuddin* (1936) 63 Cal.L.J. 573.

(g) *Munnawaru Begum v. Mir Mah-pallik* (1918) 41 Mad. 1032, 51 I.C. 489; followed in *Kanis v. Hasan Begum* (1920) 82 Cal.L.J. 151, 60 I.C. 165, ('20) A.C. 800.

(h) *Abdul Asiz v. Mahomed Ibrahim* (1941) Bom. 341, 43 Bom.L.R. 128, 196 I.C. 181, ('41) A. B. 288, affirming *Hussainbi v. Syed Kharuddin* (1939) 41 Bom.L.R. 875, 185 I.O. 675, ('39) A. B. 487.

(i) *Mahomed Hussain Farok v. Syed Ab-dul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

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to land assigned as remuneration of a Mulla or village preacher (*j*). The decision may well be supported on narrower grounds as the performance of the duties of a preacher like those of the Imam of a mosque depends upon the personality of the incumbent and cannot be assigned to a deputy. But in the case of an appointment, whether the duties are secular or religious, the Court may prefer to appoint a male mutawalli owing to the habits of seclusion of Mahomedan females (*k*).

*Difference of sect.*—In one case the Court appointed a Shia to be mutawalli of a Sunni wakf, but he was a person of considerable local influence both among Sunnis and Shins (*l*). In another case the Court refused to appoint a woman of the Babi sect to be mutawalli of a Shia wakf, though she was a lineal descendant of the founder of the wakf who was himself a Shia (*m*).

**165. Appointment of mutawalli.**—(1) The founder of the wakf has power to appoint the first mutawalli, and to lay down a scheme for the administration of the trust and for succession to the office of mutawalli. He may nominate the successors by name, or indicate the class together with their qualifications, from whom the mutawalli may be appointed, and may invest the mutawalli with power to nominate a successor after his death or relinquishment of office (*n*).

(2) If any person appointed as mutawalli dies, or refuses to act in the trust, or is removed by the Court, or if the office of mutawalli otherwise becomes vacant, and there is no provision in the deed of wakf regarding succession to the office, a new mutawalli may be appointed (*o*).

(a) by the founder of the wakf (*p*);

(b) by his executor (if any);

(c) if there be no executor, the mutawalli for the time being may, subject to the provisions of sec. 166 below, appoint a successor on his death-bed;

(d) if no such appointment is made, the Court may appoint a mutawalli. In making the appointment the Court will have regard to the following rules:—

(i) the Court should not disregard the directions of the founder except for the manifest benefit of the endowment (*q*);

(*j*) *Biyyamma v. Ahmed Sahib* (1935) 37 Bom. L. R. 257, 156 I.C. 656, ('35) A.B. 245.

(*k*) *Syed Mahomed Ghouse v. Sayabiran Sahib*, (1935) 68 Mad L.J. 684, 156 I.C. 757, ('35) A.M. 638.

(*l*) *Dyal Chund v. Syed Keramat Ali* (1871) 16 W.R. 116.

(*m*) *Shahar Banoo v. Aga Mahomed* (1907) 54 I.A. 46, 54 Cal. 148.

(*n*) *Ghaznafar v. Ahmadi Bibi* (1980) 52 All. 398, 123 I.C. 869, ('30) A. A. 159; *Shah Gulam v. Mahomed*

(1875) 3 Mad. H.C. 83.

(*o*) *Advocate-General v. Fatima* (1872) 9 B.H.C. 19; *Khajeh Salimullah v. Abul Khair* (1909) 37 Cal. 263, 3 I.C. 419; *Phatmabi v. Haji Musa* (1913) 38 Mad. 491, 21 I.C. 964.

(*p*) *Rugghan v. Dhanoo* (1927) 49 A.L.J. 435, 99 I.C. 1045, ('27) A. A. 257.

(*q*) *Khajeh Salimullah v. Abul Khair* (1909) 37 Cal. 263, 268, 3 I.C. 419.

- (ii) the Court should not appoint a stranger, so long as there is any member of the founder's family in existence qualified to hold the office (r);
- (iii) where there is a contest between a lineal descendant of the founder and one who is not a lineal descendant, the Court is not bound to appoint the lineal descendant, but has a discretion in the matter, and may in the exercise of that discretion appoint the other claimant to be mutawalli (s).

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Baillie, 603-604; Maenaghten, p 70, see 6, p 244, Case X.

**Shia law.**—Under Shia law a wakf does not become effective until transfer of possession to the mutawalli or beneficiary. See note Shia law at p. 159. The founder of the wakf is *functus officio* after he has transferred possession. He may appoint a mutawalli after dedication and before transfer of possession but not after transfer of possession (t). If he has not appointed a mutawalli he cannot make an appointment or settle a scheme after he has transferred possession for after that the beneficiaries have the right to administer the wakf (u).

**Lineal descendant.**—In *Shahar Banoo v. Aga Mahomed* (v), the founder was a Shia and his lineal descendant who claimed to be appointed mutawalli was a female of the Babi sect. The trial Judge appointed her a mutawalli, but the High Court set aside the appointment and appointed another person. This was not on the ground that she was not qualified, but because as a female she would have to perform many of her duties by deputy, and as a Babi she might not take zealous interest in carrying out the religious observances of the Shia school for which the trust was founded. This decision was upheld by the Privy Council on appeal. In considering the authorities their Lordships said: "The authorities seem to their Lordships to fall far short of establishing the absolute right of the lineal descendants of the founder of the endowment, in a case like the present, in which that founder has not prescribed any line of devolution." If the line of devolution is prescribed from generation to generation it does not follow that a female, or persons claiming through females, are excluded though it may not be desirable to appoint a female owing to their habits of seclusion (w). In a case where the founder of the wakf was a Mahomedan lady who had appointed herself first mutawalli and directed that the succession should be to the legal heirs of the second mutawalli it was held that female heirs were not excluded (x).

**Powers of Court.**—As regards the management of public religious or charitable trusts, the Privy Council in *Mahomed Ismail v. Ahmed Moola* (y) said:—

- (r) *Advocate-General v. Fatma* (1872) 9 B.H.C. 191; *In re Mahomed Haji Haroon Kadwani* (1935) 59 Bom 424, 156 I.C. 655, (35) A.B. 254
- (s) *Shahar Banoo v. Aga Mahomed* (1907) 34 I.A. 46, 34 Cal. 118.
- (t) *Syed Ali v. Syed Muhammad* (1923) 7 Pat. 468, 110 I.C. 12, (28) A. P. 532.
- (u) *Ghulam Ali v. Mohammad Ali* (1933) 144 I.C. 467, (33) A.L. 242
- (v) (1907) 34 I.A. 46, 34 Cal. 118.
- (w) *Syed Mahomed Ghous v. Sayabiran Sahib* (1935) 68 Mad.L.J. 684,

- 156 I.C. 757, (35) A.M. 638
- (x) *Warre Ali v. Sheikh Shamsuddin* (1936) 63 Cal. L.J. 573
- (y) (1916) 43 I.A. 127, 134, 43 Cal. 1085, 1100, 35 I.C. 30; *Mahomedally Adamji Peerbhoy v. Akbarally Abdul Hussain Peerbhoy* (1934) 36 Bom.L.R. 386, 59 Cal.L.J. 133, 38 Cal. W.N. 952, 66 Mad.L.J. 738, 147 I.C. 882, (34) A.P. 53
- See also *Ibrahim Esmail v. Abdool Gurrus* (1908) 35 I.A. 151, 164 [a case from Mauritius].

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"It has further been contended that under the Mahomedan law the Court has no discretion in the matter [i.e., appointment of trustees of the mosque in question] and that it must give effect to the rule laid down by the founder in all matters relating to the appointment and succession of trustees or mutawallis. Their Lordships cannot help thinking that the extreme proposition urged on behalf of the appellants is based on a misconception. The Mussalman law, like the English law, draws a wide distinction between public and private trusts. Generally speaking, in case of a wakf or trust created for specific individuals or a determinate body of individuals, the Kazi, whose place in the British Indian system is taken by the Civil Court, has, in carrying the trust into execution to give effect so far as possible to the expressed wishes of the founder. With respect, however, to public religious or charitable trusts, of which a public mosque is a common and well-known example, the Kazi's discretion is very wide. He may not depart from the intentions of the founder or from any rule fixed by him as to the objects of the benefaction; but as regards management, which must be governed by circumstances he has complete discretion. He may defer to the wishes of the founder so far as they are conformable to changed conditions and circumstances, but his primary duty is to consider the interests of the general body of the public for whose benefit the trust is created. He may in his judicial discretion vary any rule of management which he may find either not practicable or not in the best interests of the institution." Even if a wakf deed has provided that a certain person should be appointed mutawalli during the minority of a mutawalli, the Court ought not to appoint that person as mutawalli if he has repudiated the wakf (c).

In the case cited above the dispute was as regards the management of a Sunni mosque in Rangoon. The Sunnis of Rangoon consist partly of Randherias and partly of Soorties. The mosque was founded by a Randheria, it was subsequently rebuilt and improved with money the bulk of which was supplied by Randherias, and the management had been for about 50 years in the hands of Randherias. It was not alleged that they had mismanaged the mosque. In these circumstances their Lordships held that all other conditions being equal, the Randheria section was entitled to manage and act as trustees of the mosque.

*Vacancy may be filled up on application to Court.*—Where there is a vacancy in the office of mutawalli, and there is no question of removing an existing trustee, the vacancy may be filled up by an application to the Court. It is not necessary to bring a suit under sec 92 of the Civil Procedure Code (a); but before making the appointment the Court should issue notices to all persons interested (b).

*Appointment by a particular locality, such as a mosque or a graveyard, the appointment of a mutawalli may be made by a congregation of the locality (c).*

*Appointment of imam.*—An imam is ordinarily appointed by the mutawalli, but in the absence of a mutawalli an imam is to be appointed by the wakf's descendants and members of his family. If, however, the imam is found to be incompetent, the congregation is entitled to select a fit person after applying

- (2) *Bibi Zohra v. Bibi Habibunnisa* (1928) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9  
(c) *Abdul Alim v. Abur Jan* (1928) 55 Cal. 1284, 110 I.C. 416, ('28) A.C. 368; *Bibi Zohra v. Bibi Habibunnisa* (1928) 18 Pat. 417, 186 I.C. 28, ('40) A.P. 9; *Abdul Hasan Khan v. Jaffer Hussain* (1938) 13 Luck 523, ('37) A.O. 981.

- Allah Rakhoo v. Nasiruddin* (1943) O.W.N. 154, ('43) A.O. 278  
(b) *Elahi Bakh v. Mohamed Ghauri* (1939) 141 I.C. 169, ('39) A.L. 27.  
(c) *Piran v. Abdool Karim* (1891) 19 Cal. 203; *Dulawar Hussain v. Subhan Khan* ('31) A.O. 375, 136 I.C. 241; *Ghulam Mohammad v. Abdul Rasheed* (1933) 14 Lah. 558, 144 I.C. 686, ('33) A.L. 605

to the Kazi for the removal of the incompetent imam and for the appointment of the person selected by the congregation (d).

*Religious Endowments Act, 20 of 1863.*—The section does not apply to a mutawalli appointed by a Committee under this Act. Such a mutawalli is merely a servant of the Committee (e).

### 166. Mutawalli may appoint successor on his death-bed.—

If the founder and his executor are both dead, and there is no provision in the wakfnama for succession to the office, the mutawalli for the time being may appoint a successor *on his death-bed*. He cannot, however, do so while he is in health, as distinguished from death-illness (f). Nor if the office goes by hereditary right (g).

A mutawalli may on his death-bed appoint even a stranger as his successor; he is not bound to appoint a member of the founder's family (h).

**167. Office of mutawalli not hereditary.**—The Mahomedan law does not recognize any right of inheritance to the office of mutawalli. But the office may become hereditary by custom, in which case the custom should be followed (i).

Where there is a vacancy in the office of mutawalli, and the Court is called upon to appoint a mutawalli, the Court will ordinarily appoint a member of the founder's family in preference to a stranger, and a senior member in preference to a junior member. But where no such appointment is to be made, and the suit is merely one to oust from the office of mutawalli, a defendant who is *already in possession and enjoyment of the office*, the Court will not oust the defendant from the office merely because the plaintiff is the elder brother and the defendant a younger brother, or because the plaintiff is a member of the founder's family and the defendant a stranger. The reason is that according to Mahomedan law no right of inheritance attaches to the office of mutawalli. The office, however, may be hereditary by custom. Such a custom, however, is opposed to the general law, and must be supported by strict proof (j).

**168. Power of mutawalli to sell or mortgage.**—A mutawalli has no power, without the permission of the Court, to mortgage, sell or exchange wakf property or any part thereof, unless he is expressly empowered by the deed of wakf to do so.

(d) *Shakul Hameed v. Mahomed Hussain* (1940) 2 M.L.J. 446, 198 I.C. 181, ('41) A.M. 42.

(e) *Gholam Hussain Shah v. Syed Altaf Hussain* (1834) 61 Cal. 80, 149 I.C. 1215, ('94) A.C. 328.

(f) *Baillie*, 604; *Piram v. Abdul Karim* (1891) 19 Cal. 203, 219; *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom. L.R. 1058; *Mt. Kammon v. Allah Bakhsha* (1941) 193 I.C. 323, ('41) A.L. 86.

(g) *Hakim Eken v. Sahebjan Sahib* (1935) 69 Mad.L.J. 722, 159 I.C. 694, ('35) A.M. 1040; *Mahomed M. Hussain v. Syed Abdul Huq* (1942) 1 M.L.J. 564, ('42) A.M. 485.

(h) *Sheikh Amir Ali v. Syed Wazir* (1905) 9 C.W.N. 876.

(i) *Macnaghten*, p. 344, case X; *Sayad Abdula v. Sayad Zain* (1889) 13 Bom. 555, 561; *Phatmabi v. Haji Husa* (1913) 38 Mad. 491, 21 I.C. 964; *Atimannessa v. Abdul Subhan* (1916) 43 Cal. 467, 82 I.C. 21; *Mahomed Haji Haroon Kadwam, In re* (1935) 59 Bom. 424, 156 I.C. 655, ('35) A.B. 254; *Mohammad Soleman v. Tasaddug Hassan* (1935) 158 I.C. 544, ('35) A.C. 623.

(j) *Sayad Abdula v. Sayad Zain* (1889) 13 Bom. 555; *Phatmabi v. Haji Husa* (1913) 38 Mad. 491, 21 I.C. 964.



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Baillie, 605.

*Power of sale.*—An instance of such a power is a deed of wakf which authorized the mutawalli to sell the property and utilize the proceeds for the construction and maintenance of a resthouse at Mecca (k).

*Unauthorized mortgage cannot be partly valid.*—The Court removed a mutawalli for mortgaging the wakf property, and appointed a new mutawalli. When the new mutawalli sued to recover possession from the mortgagee, the latter claimed that the mortgage was valid as to the portion of the property which was settled for the benefit of the settlor's family. The Judicial Committee held that such a contention was inconsistent with the character of a wakf under which all rights of property pass out of the wakif and vest in Almighty God (l).

*Retrospective confirmation.*—It has been held in Calcutta that a mortgage of wakf property, though made without the previous sanction of the Court, may be retrospectively confirmed by the Court. A mortgage without the previous leave of the Court is not void *ab initio* (m). The Allahabad High Court acting on this principle validated a usufructuary mortgage by a mutawalli (n). Both these cases proceeded on the grounds (1) that the mortgage was necessary for the purposes of the wakf, and (2) that the pledge was not of the corpus but of the income.

*Procedure for obtaining permission of Court.*—It was held by the Calcutta High Court in a case decided in 1909 that a mutawalli, desirous of obtaining the sanction of the Court for a sale, mortgage, or lease of wakf property, must proceed by way of suit, and not by an application under the Trustees Act XXVII of 1866, the reason given being that that Act applies only to trusts in the English form constituted by persons of purely English domicile or by persons governed by the Indian Succession Act, and that it does not apply to Mahomedans (o). But this decision has been disapproved in recent cases where it was held that the sanction may be obtained on an application and that it is not necessary to bring a suit (p). It would seem that in Bombay leave may be obtained on an application under the Trustees Act (q).

*Unauthorized alienation and limitation.*—The law as regards the period of limitation for a suit to follow wakf property in the hands of a mutawalli, and to set aside unauthorized transfers of such property, and to recover possession thereof from the transferee, was amended and altered by Act I of 1929. The amendments consist of an addition of para. 2 to sec. 10 of the original Act [Limitation Act, 1908], and of the insertion of new articles, being arts. 48B, 134A, 134B and 134C. As to the law before the amendment, see the under-mentioned cases (r).

- (k) *Muhammad Usuf v. Muhammad Sadig* (1933) 14 Lah 431, 144 I.C. 271, ('33) A.L. 501.  
 (l) *Abdu Rahim v. Narayan Das* (1923) 50 I.A. 84, 91, 50 Cal 329, 71 I.C. 646, ('23) A.P.C. 44, on appeal from 47 Cal. 866.  
 (m) *Nimasa Chand v. Golam Hassan* (1909) 37 Cal 179, 3 I.C. 353; *Shauendranath v. Hade Kaza* (1932) 59 Cal 586, 137 I.C. 500, ('32) A.C. 356 [where confirmation was refused].  
 (n) *Afzal Husain v. Ohhadi Lal* (1935) 57 All. 727, 156 I.O. 791, ('35) A.A. 392.  
 (o) *Halima Khatoon, In re* (1909) 37 Cal 870, 7 I.C. 88.  
 (p) *Fakrunnessa v. District Judge* (1920) 47 Cal. 592, 56 I.C. 475; *Habibar v. Saidannessa* (1924) 51 Cal. 381, 77 I.C. 649, ('24) A.C. 472.

- Wasir Ali v. Ladley Begum* (1938) 177 I.C. 417, ('38) A.C. 437.  
 (q) See *In re Kahandas Narrandas* (1881) 5 Bom. 154, and *Lang v. Moolji* (1919) 21 Bom L.R. 1111, 54 I.C. 455, where it was held, on a petition for appointment of new trustees that the Act applied to Hindus in Bombay.  
 (r) *Vidya Varuhi v. Bahusami* (1921) 48 I.A. 302, 44 Mad 831, 65 I.C. 161, ('22) A.P.O. 123; *Abdur Rahim v. Narayan Das* (1923) 50 I.A. 84, 50 Cal. 329, 71 I.C. 646, ('23) A.P.O. 44 [mortgage]; *Subbaya v. Mahammad* (1923) 50 I.A. 295, 46 Mad 761, 74 I.C. 492, ('23) A.P.C. 175 [sale in execution of decree]; *Alla Rakhi v. Shah Mahammad Abdul Rahim* (1934) 61 I.A. 50, 56 All 111, 147 I.C. 887, ('34) A.P.C. 22.

**169. Power of mutawalli to grant leases.**—A mutawalli has no power to grant a lease of wakf property, if it be agricultural, for a term exceeding three years, and, if non-agricultural, for a term exceeding one year—

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- (a) unless he has been expressly authorized by the deed of wakf to do so;
- (b) or, where he has no such authority, unless he has obtained the leave of the Court to do so (s); such leave may be granted even if the founder has expressly prohibited a lease for a longer term.

Baillie, 606-607.

**Permanent lease.**—It follows that a permanent lease cannot be granted by a mutawalli without leave of the Court (t). Such leave must be obtained on an application to the District Judge. A Munsiff cannot validate such a lease by an order made in a pending suit (u). A single judge of the Bombay High Court, however, has held that where a mutawalli has lessed wakf property for a long term without the sanction of the Court, the Court has the power to sanction the lease retrospectively if it is satisfied that the transaction is for the benefit of the wakf (v). The lease however binds the mutawalli personally during his lifetime and he cannot repudiate it and evict the lessee (w).

**Presumption of a legal origin.**—A mutawalli sought to evict a tenant who claimed that he and his ancestors had been for a long and indefinite time in occupation as permanent tenants. The mutawalli relied on the Moghul sannad of 1772 which contained an absolute restriction on the mutawalli's power of granting a permanent lease. But as the wakf was of considerable antiquity and already established and subject to the rules of Mahomedan law before the grant of the sannad, the Court made the presumption of a lost and unrecorded permission of the Kazi (x). No such presumption, however, can be drawn where the lease has been granted by the mutawalli in 1891 and proof of leave granted by the District Judge is not forthcoming (y).

**Limitation.**—See note to sec. 168 above.

**169A. Creditor's rights.**—As a mutawalli (unless authorized by the deed of wakf) has no power of alienation without the leave of the Court, a creditor advancing money to a mutawalli for carrying out the purpose of the trust has no right to be indemnified out of the trust property. In this respect a creditor of a mutawalli is in a worse position than a creditor of the shebait of a Hindu endowment (z). A de-

- v. Khazi Mohideen Sherif Sahib (1933) 64 Mad. L.J. 706, 144 I. C. 541, ('38) A.M. 533.
- (s) Wozatunnessa, in the matter of (1908) 38 Cal. 21.
- (t) Ahmunnisa Bibi v. Mohammad Abdul Rahman (1938) A.L.J. 727, 177 I.C. 205, ('38) A.A. 485.
- (u) Abdul Rahman Molla v. Abdul Hossain Molla (1936) 40 Cal. W.N. 585.
- (v) Zafarbhai v. Chaganlal (1941) 48 Bom. L.R. 854, ('42) A.B. 21. See also Sundaramurthi v. Chotti Bibi (1942) 2 M.L.J. 164, ('42) A.M.

- 641.
- (w) Sayed Azeed Hossain v. Nareesh Nandini Dasi (1936) 40 Cal. W.N. 594; Sundaramurthi v. Chotti Bibi (1942) 2 M.L.J. 164, ('42) A.M. 641.
- (x) Mohammad Masafar-ol-Musavi v. Jabbar Khan (1930) 57 I.A. 125, 57 Cal. 1293, 123 I.C. 722, ('30) A.P.C. 103.
- (y) Sundaramurthi v. Chotti Bibi (1942) 2 M.L.J. 164, ('42) A.M. 641.
- (z) Sallendra Nath Palit v. Hads Kasa Mane (1932) 59 Cal. 586, 137 I. C. 506, ('32) A.C. 456; Mahabir

**Ss. 169A-171A**—cree against *A.B.* “as mutawalli” is not sufficient to create a charge on the wakf property of which *A.B.* is mutawalli. A decree will not bind the wakf property unless it expressly says so; and in that case the proper procedure in execution is to appoint a receiver of the income of the endowment (*a*).

**170. Allowance of officers and servants.**—The mutawalli has no power to increase the allowance of officers and servants attached to the endowment where the allowance is fixed by the wakif (dedicator), but the Court may in a proper case increase such allowance.

Ameer Ali, 4th ed. I, 469.

**171. Remuneration of mutawalli.**—The founder may provide for the remuneration of the mutawalli. Such remuneration may be a fixed sum or it may be the residue of the income of the wakf property after defraying the expenses necessary for the maintenance of the wakf (*b*). If no provision is made by the founder for the remuneration of the mutawalli, the Court may fix a sum not exceeding one-tenth of the income of the wakf property (*c*). If the amount fixed by the founder is too small, the Court may increase the allowance, but it must not exceed the limit of one-tenth (*d*).

**171A. Statutory Control.**—The Mussalman Wakf Act, 1923 (XLII of 1923) was passed with the object of making provision for the better management of wakf property and for ensuring the keeping and publication of proper accounts of wakf property. By sec. 3 the mutawalli is bound to furnish the District Court with a statement containing a description and particulars of the wakf property and, if the wakf has been created in writing, with a copy of the wakfnama. Under sec. 4 this statement is published and on application by any person the Court may require the mutawalli to furnish further particulars. The mutawalli is also bound under sec. 5 to prepare and file in Court every year an account of all monies received or expended by him on behalf of the wakf, which account must be duly audited (s. 6) and verified (s. 8). This account is open to inspection by the public (s. 9). A mutawalli who fails to comply with the pro-

*Prasad Marwari v. Syed Shah Muhammad Yehia* (1935) 15 Pat. 88, 163 I.O. 869, ('36) A.P. 590.  
(a) *Zubaida Sultan Begum v. Dawood Ismail Makra* (1937) Cal. 90, ('37) A.O. 402.  
(b) *Sayid Ismail v. Hamid Begum* (1921) 6 Pat.L.J. 218, 233-234, 62 I.O. 455, ('21) A.P. 125.  
(c) *Mehdadin v. Sayiduddin* (1898) 20 Cal. 210, 821.  
(d) Ameer Ali, 4th ed. Vol. I, 469 et seq.

visions of these sections is punishable with fine (s. 10). The Act of 1923 does not apply to any wakf (such as is described in the Wakf Validating Act, 1913, sec. 3) under which any benefit is, for the time being, claimable by the wakif or any of his family or descendants. Ch. XII,  
S. 171A.

Where a wakf was created about 70 or 80 years before the suit to provide "facilities for travellers on the road from Madras to Vellore," and it was provided that the surplus income of the wakf properties may be enjoyed by the creator of the wakf and the members of his family, it was held by the Madras High Court that the Act of 1923 applied to the wakf (d1).

In Bengal this Act has been replaced by the Bengal Wakf Act, 1934 (Beng. Act XIII of 1934) (cf. s. 82 thereof) which contains more elaborate provisions for the proper administration of wakf property in Bengal. It also overrides the Charitable and Religious Trusts Act, 1920. The provisions of the Bengal Act include the appointment of a Commissioner of Wakfs (s. 16) assisted by a Board of Wakfs (s. 7) with power to investigate the nature and extent of wakf property (s. 27), to maintain a register of wakfs (s. 45), to examine (s. 48), and audit (s. 49), yearly accounts to be filed by the mutawallis and generally to give directions for the proper administration of wakfs. The Bengal Act makes special provision for the protection of wakfs which are called wakfalal-aulad (s. 6 (11) and s. 52), defined as a wakf in which 75 per cent. of the net available income is for the time being payable to the wakif or any member of his family or descendants. Such wakfs if mismanaged may be brought by the local Government under the same provisions as charitable wakfs (ss. 32-34).

The Commissioner of Wakfs in Bengal has power to intervene in the interests of a wakf in any suit in respect of wakf property (s. 70), but under sec. 83 rights already accrued before the commencement of the Act are saved. The Commissioner is therefore not entitled to intervene in an appeal (e), or after the Court has passed a decree for a scheme under sec. 92 of the Civil Procedure Code (f). The Commissioner may himself file a suit for the reliefs referred to in section 92 without the consent of the Advocate-General, or for the reliefs referred to in sec. 14 of the Religious Endowments Act, 1863, without the leave of the Court (s. 73).

(d1) *Kadir Murthusa Hussain v. Mahmud Murthusa Hussain* (1942) 2 Mad L.J. 672, ('43) A.M. 234.  
(e) *Mahmuda Bibi v. Ifat Arook Begum* (1937) Cal. 77.

(f) *Commissioner of Wakfs, Bengal v. Umme Salma* (1937) Cal. 573, 41 Cal. W.N. 382, 65 Cal.L.J. 840, ('37) A.O. 150.

**S. 171A** Also his consent is required to any suit filed by any other person.

The United Provinces Muslim Wakfs Act, 1936 (XIII of 1936) is an Act similar to the Bengal Act which replaces for the United Provinces of Agra and Oudh sections 5-10 of Act 42 of 1923, and the Charitable and Religious Trusts Act 14 of 1920. Under this Act the Commissioner is assisted by two Boards, a Sunni Board and a Shia Board. The Act has been amended by the United Provinces Muslim Wakfs (Amendment) Act XI of 1937, and the United Provinces Muslim Wakfs (Validating and Amendment) Act VIII of 1941.

In Bombay, Act XLII of 1923 has been amended by the Mussalman Wakf (Bombay Amendment) Act XVIII of 1935.

The Bengal and United Provinces Acts contain provisions enabling the Commissioner of Wakfs to investigate and determine the nature and extent of the wakf property. There is no similar express provision in the Act of 1923. There is a conflict of decision as to whether such a power is given to the Court by implication. The question arose when a recalcitrant mutawalli omitted to file accounts and justified his omission by denying the existence of a wakf. The Allahabad High Court in one case held that the Court had no power under the Act of 1923 to order a mutawalli to file accounts though it could under sec. 10 inquire whether the property was wakf or not (g). But in a later case the same High Court held that the District Court had not power even under sec. 10 to inquire whether the property was wakf or not (h). The Oudh (i) and Bombay (j) High Courts have held that the Court has power to inquire whether there is a wakf or not. The Patna High Court has held that the Court cannot proceed if the existence of the wakf is denied (k), but may proceed if the defence is merely that the Wakf is one to which the Act of 1923 does not apply (l).

According to the Bombay decisions, proceedings under sec. 10 of the Act of 1923 are not ordinary criminal proceedings and the offending mutawalli must be dealt with, not by a magistrate, but by the District Judge (m). But the effect of secs. 12 and 13 of the Bombay Amending Act must now be considered. The Lahore High Court (n) and the Madras High Court (o) have held that under sec. 10 of the Act of 1923 the District Judge has no jurisdiction to hold an enquiry into the nature of the property where the alleged mutawalli denies the existence of the wakf, and they have also held that where the mutawalli has not complied with the provisions of the Act the District Judge is not empowered to impose a fine on him.

The provisions of the Act of 1923 and those of the Charitable and Religious Trusts Act, 1920 (XIV of 1920) overlap. This difficulty has been met in the

- (g) *Nasrullah Khan v. Wajid Ali* (1930) 52 All. 167, 118 I.C. 717, ('80) A.A. 81.  
 (h) *Wahed Hasan v. Abdul Rahman* (1935) 57 All. 754, 157 I.C. 1089, ('35) A.A. 254.  
 (i) *Mohammad Baqar v. Mohammad* (1933) 7 Luck. 601, 138 I.C. 725, ('32) A.O. 210.  
 (j) *In re Sayedna Taher Sarfuddin* (1934) 58 Bom. 302, 36 Bom.L.R. 311, 154 I.C. 940, ('34) A.B. 169.  
 (k) *Syed Ali v. Collector of Bhagalpore* (1927) 101 I.C. 207, ('27) A.P.

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- (m) *Kale Khan v. Karim Rahman* (1935) 37 Bom.L.R. 207, 156 I.C. 203, ('35) A.B. 207.  
 (n) *Shia Youngmen's Association v. Fateh Ali Shah* (1941) Lah. 395, 194 I.C. 351, ('41) A.L. 145 (F.B.).  
 (o) *Imad Sahib v. Bhikasha Sarguru* (1942) Mad. 148, (1941) 2 M.L.J. 541, ('41) A.M. 897.

Bengal and United Provinces Acts by excluding the provisions of the Act of 1920. But prior to this provincial legislation it was held that if the wakf is substantially for public purposes of a religious or charitable nature it falls within the scope of the Act of 1920 and a party interested might either apply under that Act (p) or file a suit under sec. 92 of the Code of Civil Procedure (q). If the wakf is a mixed wakf, i.e., a wakf partly for public purposes and partly for private purposes application must be made under the Act of 1923 (r).

Under the Bombay Act one or more members of a wakf committee if authorized by the Court may sue for the protection or recovery of the property of a wakf or for the application of such property to any public charitable or religious purpose notwithstanding anything contained in sec. 92 of the Code of Civil Procedure.

**172. Removal of mutawalli.**—A mutawalli may be removed by the Court on proof of misfeasance or breach of trust, or if it is found that he is otherwise unfit to hold the office, though the founder may have expressly directed that he should not be removed in any case. The founder has no power, after delivery of possession, to remove a mutawalli in any case, unless he has expressly reserved such a power in the deed of wakf (s).

Baillie, 608, Macnaghten, p. 79, sec. 3. A founder, who is himself a mutawalli, may be removed by the Court on the ground of misconduct.

In the case of a public, religious or charitable trust the primary duty of the Court is to consider the interests of the public. The Court will therefore remove a mutawalli who is insolvent (t), or who claims the wakf property as his private estate (u), and will frame a scheme of management. It is conceivable that if there has been no mismanagement a claim to the property under a mistaken impression of right would not be good reason for removing a mutawalli; but the assertion of a claim adverse to the trust coupled with neglect of duty would render a mutawalli liable to be removed (v).

A mutawalli appointed by a committee under the Religious Endowments Act XX of 1863 is not a mutawalli under Mahomedan law but a servant liable to be dismissed by the committee (w).

**173. Office of mutawalli not transferable.**—A mutawalli has no power to transfer the office to another, unless such a power is expressly conferred upon him by the founder. But he may appoint a deputy to assist him in the management of the endowed property (x).

(p) 10 Pat. 506, *supra*.

(q) *Nafthuddin Ahmed v. Amir Hasan* (1934) 158 I.C. 557, ('34) A.P. 443.

(r) *Shabbir Husain v. Ashiq Husain* (1920) 4 Luck. 429, 117 I.C. 739, ('29) A.O. 226; *Ali Bakhtyar v. Khandkar Altaf Hossein* (1933) 60 Cal. 790 145 I.C. 688, ('33) A.C. 581; *Emda Ali Chaudhari v. Tubulla* ('37) A.C. 313.

(s) *Gulam Hussein v. Ali Afan* (1898) 4 Mad.H.C. 44; *Advocate-General v. Fatima* (1870) 9 Bom.H.O. 19, 23-24 [a Shia case]; *Hiddatunnissa v. Syed Afzul* (1870) 2 N.W.F. 452

[a Shia case]

(t) *Mahomedally Adamji Peerbhoy v. Jhansi Abdul Hussain* (1934) 86 Bom. L.R. 386, 59 Cal.L.J. 133, 38 Cal. W.N. 452, 68 Mad.L.J. 733, 147 I.C. 882, ('34) A.P.C. 53.

(u) *Ahmad Shah Mubarak Shah v. Altaf Khan* (1934) 152 I.C. 328, ('34) A. Pesh. 67.

(v) *Nawaz Ahmed Khan v. Hasmuddin Ahmed* (1936) 162 I.C. 762, ('36) A.C. 262.

(w) *Gholam Hussein Shah v. Syed Altaf Hossein* (1934) 61 Cal. 60, 149 I.C. 1215, ('34) A.C. 328.

(x) *Khajeh Salimullah v. Abdul Khair*

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An hereditary ministrant cannot make a valid settlement of his right to receive offerings at a Darga or Shrine (y).

**173A. Attachment of office of mutawalli.**—The office of mutawalli cannot be attached in execution of a personal decree against the mutawalli (z). See sec. 157.

**173B. Limitation for suits against mutawalli.**—No suit against a mutawalli or manager of wakf property, or against his legal representatives or assigns (not being assigns for valuable consideration); for the purpose of following in his or their hands such property or the proceeds thereof, or for an account of such property or proceeds, is now barred by any length of time.

Sec. 10 of the Limitation Act, 1908, as amended by sec. 2 of Act I of 1929. As to limitation for suits where the property is transferred for a consideration, see arts. 48B, 134A, 134B and 134C, inserted by sec. 3 of Act I of 1929. Sec. 10 of the Limitation Act referred to a person in whom the property has become "vested in trust" and the amendment was made in consequence of the decision in *Frida Varuthi v. Balusami* (a) that a mutawalli is not such a person. The amendment is not retrospective. In a suit instituted before the 1st January 1929 the mujawars or servants of a shrine who had been put in possession of wakf land by the Sajjadanishin on account of their services could not claim the benefit of the section as assigns of the Sajjadanishin or manager of the shrine (b).

**173C. Adverse possession against wakf.**—Wakf property may be lost by adverse possession (c).

#### Miscellaneous.

**174. Public Mosques.**—Every Mahomedan is entitled to enter a mosque dedicated to God, whatever may be the sect or school to which he belongs, and to perform his devotions according to the ritual of his own sect or school. But it is not certain whether a mosque *appropriated exclusively by the founder to any particular sect or school* can be used by the followers of another sect or school (d).

- (1909) 37 Cal. 263, 277-279, 3 I O 419; *Haji Ali v. Anjuman-e-Islamia* (1931) 12 Lah. 590, 596, 135 I O 56, ('31) A.L. 379; *Mohammad Solomon v. Tasaddaq Hossain* (1935) 153 I.O. 544, ('35) A.O. 623; *Wahid Ali v. Ashraf Hossain* (1882) 8 Cal. 782  
(y) *Hakim Khan v. Sahibjan Sahib* (1935) 69 Mad.L.J. 722, 169 I. O. 694, ('35) A.M. 1040.  
(z) *Sarkum v. Rahaman Bukeh* (1896) 24 Cal. 83, 91.  
(a) (1921) 48 I.A. 302, 44 Mad. 831, 65 I.O. 161, ('22) A.P.C. 123.  
(b) *Allah Raishi v. Shah Muhammad Abdul Rahim* (1934) 61 I.A. 50, 56 All. 111, 36 Bom.L.R. 408, 38 Cal.W.N. 490, 59 Cal.J. 157, 66 Mad. 431, 147 I.O. 887, ('34)

- A.P.C. 77.  
(c) *Shahidganj v. Gurdwara Parbhandha Committee* (1940) Lah. 493, 67 I.A. 251, ('40) A.P.C. 116; *Abdur Rahim v. Narayandas* (1928) 50 I.A. 84, 50 Cal. 329, 71 I.O. 646, ('23) A.P.C. 44; *Hafiz Mohammad v. Svarup Chand* (1941) 2 Cal. 434, 73 O.L.J. 475, 200 I.O. 822, ('42) A.C. 1.  
(d) *Ata-Ullah v. Azam Ullah* (1889) 12 All. 494; *Jangu v. Ahmad-Ullah* (1889) 13 All. 419 F.B.; *Fazl Karim v. Maula Bakhsh* (1891) 18 Cal. 446, 18 I.A. 59; *Abdus Subhan v. Kordan Ali* (1908) 35 Cal. 294; *Maula Bakhsh v. Amir-ud-Din* (1920) 1 Lah. 317, 57 I.O. 1000; *Jivan Eken v. Habib* (1933) 14 Lah. 516, 144 I.O. 658, ('33) A.

In *Ata-Ullah's* case (e), it was held by the High Court of Allahabad, that a mosque dedicated to God is for the use of all Mahomedans, and cannot lawfully be appropriated to the use of any particular sect. This ruling was referred to by their Lordships of the Privy Council in *Fazl Karim's* case, but they did not express any opinion on it stating that the facts of the case before them did not properly raise that question. In *Abdus Subhan's* case, the High Court of Calcutta doubted whether a special dedication of a mosque to any particular sect of Mahomedans was in accordance with Mahomedan Ecclesiastical law. The view taken in *Ata-Ullah's* case was followed by the High Court of Lahore (f) and that Court has said that there is no such thing as a Shia mosque or a Sunni mosque (g). The question therefore cannot be said to be definitely settled. But when a mosque is not appropriated to a particular sect, there is no doubt that it may be used by any Mahomedan for the purpose of worship without distinction of sect. Thus a Shafei may join in a congregational worship, though the majority of worshippers in the congregation may be Hanafis; and he cannot be prevented from taking part in the service, because the Shafei practice is to pronounce *amin* (amen) in a loud voice and the Hanafi practice is to mutter the word softly. Similarly, Mahomedans of the *Imshi-bi-hads* or *Wahabi* sect have the right to worship in a mosque built primarily for the use of Hanafis and generally used by them, though their views in the matter of ritual differ from those of the Hanafis. Shias may worship in a mosque where the rest of the congregation are Sunnis but they are not entitled to have a separate call to prayer or to hold a congregation behind an Imam of their own (h); and there is no rule of Mahomedan law to entitle the members of a new sect to pray as a separate congregation behind an Imam chosen by themselves (i).

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The Court will not, in framing a scheme under a decree by which it is declared that the members of a particular sect are entitled to use a particular mosque, vest in the religious head of the sect the power to exclude at his discretion any member of the community from joining in congregational prayers, or to prevent him from attending the mosque for prayers (j).

As to management of mosques, see note to sec. 165, "Powers of Court."

**174A. Whether mosque a juristic person.**—In the undermentioned case (k) the Lahore High Court held that a mosque is a juristic person. The question was discussed in the *Shahid-ganj* case (l), and although their Lordships of the Privy Council reserved their opinion on it, the trend of their observations seems to show that the view of the Lahore High Court did not commend itself to them. Their Lordships however held that suits cannot be brought by or against mosques as artificial persons.

- L. 759; *Syed Ahmed v. Hafiz Zaid* (1934) 153 I.O. 1095, ('84) A.A. 782.  
(e) (1889) 12 All. 494, *supra*.  
(f) 1 Lah. 317 *supra*; 14 Lah. 518, *supra*.  
(g) *Mt Iqbal Begum v. Mt. Syed Begum* (1938) 140 I.O. 829, ('88) A.L. 80.  
(h) *Amir Hussain Shah v. Hafiz Ghulam Rasool* (1936) 161 I.O. 652, ('86) A. Pesh. 65.  
(i) *Hakim Khalid v. Malik Ieraf* (1917)

- 2 Pat L.J. 108, 37 I.O. 802; *Safat Ali Khan v. Syed Ali Mian* (1933) All.L.J. 518, 144 I. O. 298, ('33) A.A. 284.  
(j) *Akbarally v. Mahomedally* (1932) 57 Bom. 551, 84 Bom. L.R. 655, 188 I. O. 810, ('32) A.B. 356.  
(k) *Maula Bux v. Hafizuddin* (1926) 94 I. O. 7, ('26) A.L. 872.  
(l) *Shahidganj v. Gurdwara Parbandha Committee* (1940) Lah. 493, 67 I. A. 251, ('40) A.P.O. 116.



**S. 175** 175. *Sajjadanashin; Khankah*.—A *sajjadanashin* is the head of a *khankah*, a Mahomedan institution analogous in many respects to a *math* where Hindu religious instruction is given. He is the teacher of religious doctrine and rules of life, and the manager of the institution and the administrator of its charities, and has, ordinarily speaking, a larger right in the surplus income than a *mutawalli* (*m*). But this does not mean that in every case the whole income from a *khankah* is at the disposal of the *sajjadanashin*. At certain shrines the members of the founder's family other than the *sajjadanashin* are entitled to share in the surplus offerings which remain after payment of expenses (*n*).

The word "*sajjadanashin*" (spiritual superior) is derived from *sajjada*, that is, the carpet used by Mahomedans for prayer, and *nashin*, that is, sitting. The *sajjadanashin* takes precedence on the carpet during prayers. The office of a *mutawalli* is a secular office, that of a *sajjadanashin* is a spiritual office, and he has certain spiritual functions to perform (*o*). The founder is generally the first *sajjadanashin* and after his death the spiritual line is continued by a succession of *sajjadanashins* (*p*). In the absence of a direction in the *wakfnama* the succession to the office of *sajjadanashin* is regulated by custom. One custom is that the "bhik" or order i.e. an electoral body consisting of *fakirs* and *murids*, install a competent person generally a son or nominee of the late *sajjadanashin* (*q*). In a case before the Privy Council the "bhik" delegated their power to elect a *sajjadanashin* and it was held that the appointment of the *sajjadanashin* made in this manner was valid (*r*). If the Court is appointing a *sajjadanashin* it should take account of the spiritual tradition and appoint if possible a descendant of the founder (*s*). As to the importance of nomination by the last *sajjadanashin* see the observations of Agha Hader J., in *Ghulam Mohammad v. Abdul Rashid* (*t*).

The status of a *sajjadanashin* is higher than that of a *mutawalli*. He is the head of the institution and has a right to exercise supervision over the *mutawalli's* management (*u*). But the *sajjadanashin* may also be a *mutawalli* and in that case, with reference to the *wakf* property he is in no better position than a *mutawalli*. He has no power to borrow money for the purpose of carrying out the objects of the trust, but he may like a *mutawalli* borrow money and incur debt, with the sanction of the Court, for the preservation of the *wakf* property (*v*). The Court may remove a *sajjadanashin* for misconduct and when

- (m) *Vidya Varuthi v. Balusami* (1921) 48 I.A. 302, 312, 44 Mad 831, 841, 65 I.O. 161, ('22) A.P.C. 123, *Zoolaka Bibi v. Syed Zynul Abedin* (1904) 6 Bom L.R. 1058  
(n) *Muhammad Hamud v. Mian Mahmud* (1923) 50 I.A. 92, 105-106, 4 Lah 15, 29, 77 I.C. 1009, ('22) A.P.C. 384.  
(o) *Maula Shah v. Ghane Shah* (1938) 40 Bom L.R. 1071, 42 O.W.N. 1018, 175 I.O. 454, ('38) A.P.C. 202, See *Puran v. Abdool Karim* (1891) 19 Cal 203; *Secretary of State v. Mohiuddin* (1900) 27 Cal 674.  
(p) *Syed Shah v. Syed Ali* (1932) 11 Pat 288, 138 I.O. 417, ('32) A.P. 38; *Ghulam Karul v. Ghulam Qutab-ud-din* ('42) A.L. 142.  
(q) 11 Pat. 288 *supra*; *Ghulam Mohammad v. Abdul Rashid* (1928) 14

- Lah 558, 144 I.O. 636, ('38) A.L. 905. *Ali Shah v. Fateh Mahammad Mutawalli* (1935) 159 I.O. 237, ('35) A.L. 657; *Ima'umya v. Wahedani* (1912) 36 Bom. 398, 14 I.O. 469.  
(r) *Maula Shah v. Ghane Shah* (1938) Bom. L.R. 1071, 42 O.W.N. 1018, 175 I.O. 454, ('38) A.P.C. 202.  
(s) *Nayyuddin Ahmad v. Amir Hasan* (1934) 153 I.O. 557, ('84) A.P. 443.  
(t) (1933) 14 Lah 558, 144 I.O. 636, ('38) A.L. 905.  
(u) *Sardar Ali v. Gahana Shah* (1933) 142 I.O. 847, ('33) A.L. 441.  
(v) *Mahabir Prasad Marwari v. Syed Shah Mahomed Yafia* (1930) 16 Pat. 88, 163 I.O. 869, ('36) A.P. 390.

framing a scheme may separate the offices of *sajjadanashin* and mutawalli (w). A minor cannot be appointed a *sajjadanashin* (x).

If land purchased by the founder of a *khankah* has been held by the *sajjadanashin* for several generations it is presumed to be wakf and attached to the *khankah* (y). But this presumption is rebuttable and it may be shown that the grant was a personal gift to the *sajjadanashin* even though his descendants make provision out of the income for the upkeep of the *khankah* (z). Property given for the upkeep of buildings and schools connected with a *khankah* can not be attached in execution of a personal decree against the *sajjadanashin* (a).

A provision in a wakfnama for *naubat nawaz* (drum beaters) attached to a *khankah* is not invalid (b).

*Members of the founder's family.*—In the absence of an express provision in the grant or of proved custom, members of the family of the founder have no right to share in the surplus offerings; though the *sajjadanashin* may in his discretion make an allowance to indigent members (c).

*Alienation by sajjadanashin.*—The right of a *sajjadanashin* to receive a share of the offerings is a right attached to his office and each successive incumbent of that office is entitled to receive that share as long as he holds the office. An alienation, therefore, of his share in the offerings made by a *sajjadanashin* cannot bind his successors (d).

*Offerings.*—In a recent case in respect of the tomb of Khwaja Moinuddin Chisti at Ajmer the Privy Council held on the facts of the case that both the *Sajjadanashin* and the *Khadiuns* (servitors) were entitled to share in the offerings made at the tomb, but it was held that such offerings as *qaharposhes* (i.e., coverings for the tomb) which were presented for the specific use of the Durgah were the property of the Durgah and must be kept by the trustees (e).

**175A. Kazi.**—The Mahomedan law does not regard the office of Kazi as hereditary (f). A claim to such a right, though supported by custom, is not one that can be recognised by a Civil Court (g).

A Kazi may be appointed by the Government (h) or by some internal arrangement among the Mahomedans of each locality (i).

The word kazi means a judge and the Privy Council have said that in the British system the place of a kazi is taken by the Civil Courts (j). It has been generally supposed that the District Judge is the proper person to perform the functions of a Kazi (k). But in *Burhan Mirdha v. Mt. Khodeja* (l), the

(w) 11 Pat. 288 *infra*.

(x) *Puran v. Abdul Karim* (1891) 19 Cal. 208, 219.

(y) *Muran Baksh v. Ghulam Nabi* (1898) 14 Lah. 624, ('33) A.L. 725.

(z) *Ahmad Ashraf v. Murtaza Ashraf* (1935) 11 Lah. 93, 154 I.C. 1023, ('35) A.O. 299.

(a) *Shah Mohammad v. Mahmood* (1927) 2 Luck. 109, 100 I.C. 241, ('27) A.O. 113.

(b) *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 828, 136 I.C. 417, ('82) A.P. 33.

(c) *Jagar El Edroos v. Mohammed El Edroos* (1937) 39 Bom.L.R. 277, 169 I.C. 282, ('37) A.B. 217.

(d) *Altaz Hussain v. Ali Rasul Ali Khan* (1938) O.W.N. 258, 172 I.C. 985, ('38) A.P.O. 71.

(e) *Altaz Hussain v. Ali Rasul Ali Khan* (1938) O.W.N. 258, 172 I.C. 985,

('38) A.P.O. 71.

(f) *Jamal Walad Ahmed v. Jamal Walad Jallat* (1877) 1 Bom. 633; *Dawdeha v. Iemalaha* (1878) 3 Bom. 72. *Baba Kakaji v. Nasseruddin* (1893) 18 Bom. 103.

(g) *Kasamkhan v. Kazi Abdullah* (1926) 50 Bom. 133, 93 I.C. 185, ('26) A.B. 153.

(h) See the Kazi's Act XII of 1880, and *Sheikh Ummar v. Budan Khan* (1912) 87 Mad. 228, 25 I.O. 898.

(i) See (1926) 50 Bom. 133, at p. 146, 93 I.O. 185, ('26) A.B. 158, *supra*.

(j) *Mahomed Imaul v. Ahmed Mulla* (1916) 43 I.A. 127, 43 Cal. 1085, 35 I.O. 80.

(k) *Mahmuddin v. Rahima Bibi* (1934) 37 Cal. W. N. 1043, 53 Cal.L.J. 73, 149 I.C. 1028, ('34) A.O. 104.

(l) (1937) 2 Cal. 79, 41 Cal.W.N. 314.

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Calcutta High Court has pointed out that the idea is derived from cases which refer to wakf property and particularly to sanction to the alienation of wakf property (m) and this is because under the Mohamedan regime the administration of wakf property was in exercise of a power specially conferred on the Chief Kazi (n). The Court also said that jurisdiction is a question of procedure which is governed not by Mahomedan law but by the Code of Civil Procedure. The Court therefore held that a suit by a Mahomedan wife for a declaration that her marriage had been dissolved by a divorce was triable by a Subordinate Judge as the relief was valued at Rs. 10 for a declaration and Rs. 5 for an injunction. But as to this decision see sec. 5A and sec. 241 *infra* and sec. 5 of the Shariat Act XXVI of 1937.

If a kazi has exercised his office for a long time everything will be presumed in favour of the legality of the original appointment (o).

**175B. Takia.**—A *takia* may be the object of a valid endowment or wakf.

*Takia* means literally a resting place. Hence a burial ground is sometimes called a *takia* (p). The fact that a place is called a *takia* does not prove that it is wakf property (q). A *takia* may be only a place of assembly in a village and devoid of any religious significance, or it may be the platform in a Muslim graveyard where prayers are said (r). A man may take charge of a graveyard and call himself a *takia-dar* but that does not show that the land is wakf or that he is the mutawalli (s). A fakir or holy man may build a hut and take up his residence near the *takia* or prayer platform in the graveyard and impart religious instruction and call the place a *khankah*. Nevertheless the *khankah* is not wakf property. This seems to be what the Lahore High Court meant when it said that "*khankahs* and *takias* and such like institutions do not come within the strict purview of Mahomedan law" (t). But a *takia* may become wakf by long use (u). The fakir may collect numerous disciples at his residence which will then develop into an institution of public importance and be a real *khankah*. Such *khankahs* are called *takias* (v); and may be the object of a valid endowment (w). In a recent case the Privy Council said: "A *takia* is a place where a fakir or dervish (a person who abjures the world and becomes an humble servitor of God) resides before his pious life and teachings attract public notice, and before disciples gather round him, and a place is constructed for their lodgment. A *takia* is recognized by law as a religious institution, and a grant or endowment to it is a valid wakf or public trust for a religious purpose" (x).

**175C. Imambara.**—An imambara is an apartment in a private house or a building set apart like a private chapel for religious purposes. It is intended for the use of the

- 65 Cal. L. J. 21, 168 I.O. 689, ('37) A.O. 189.  
(m) *Nhoma Ohurn v. Abdul Kabeer* (1899) 3 Cal. W.N. 158; *Nemai Ohand v. Golam Hossain* (1910) 37 Cal. 179, 3 I.O. 853; *Fakruddin v. District Judge* (1920) 47 Cal. 592, 60 I.O. 475; *Abdul Rahman Molla v. Abdul Hossain Molla* (1936) 40 Cal. W.N. 584.  
(n) *Atimannessa v. Abdul Sobhan* (1916) 43 Cal. 467, 32 I.O. 21.  
(o) *Mahammad Yuseb v. Sayad Ahmed* (1870) 1 Bom. H.C.R. App. xviii.  
(p) See *Baqar Khan v. Babu Raghendra Pratap Sahi* (1934) 9 Luck. 568, 148 I.C. 453, ('34) A.O. 263; *Mohar Din v. Hakim Ali* (1936) 167 I.O. 561, ('35) A.L. 912; *Ohufko v. Gambhir* (1931) 6 Luck. 452, 130

- I.O. 117, ('31) A.O. 45.  
(q) *Shafa-ud-din v. Mahbub* (1930) 11 Lah. 632, 125 I.O. 898, ('30) A.L. 714.  
(r) *Jani v. Bishan Singh* ('35) A.L. 698  
(s) *Mahomed Abud v. Haji Bakesh* (1936) 168 I.O. 916, ('36) A.O. 133.  
(t) *Ali Shah v. Fateh Mohammad Mutawalli* (1935) 159 I.O. 237, ('35) A.L. 657.  
(u) 6 Luck. 452, *supra*.  
(v) *Sardar Ali v. Gehna Shah* (1938) 142 I.O. 847, ('33) A.L. 444  
(w) *Hussain Shah v. Gul Muhommad* (1925) 6 Lah. 140, 88 I.O. 816, ('25) A.L. 420  
(x) *Maula Shah v. Ghane Shah* (1938) Bom. L.R. 1071, 42 C.W.N. 1018, 175 I.O. 454, ('38) A.P.C. 202.

owner and members of his family, though the public may be admitted with the permission of the owner. It may be the object of a valid wakf—Sec. 146E. Such a wakf is a private wakf and not a public wakf nor a trust for the purposes of sec. 92 of the Code of Civil Procedure (y).

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**175D. Grant of land revenue.**—A grant of land revenue for the remuneration of a village Mulla does not constitute a wakf or endowment. The land is partible and heritable and if the holders do not perform the duties of the office, Government enforces its objects by levying full assessment (z).

**176. Enactments relating to administration of wakfs.**—The following is a list of enactments which provide for the protection, enforcement and administration of public endowments:—

- (i) Official Trustees Act II of 1913.
- (ii) Charitable Endowments Act VI of 1890, secs. 2, 3, 4, 5, 6 and 8.
- (iii) Religious Endowments Act XX of 1863, sec. 14.
- (iv) The Code of Civil Procedure, 1908, secs. 92-93.

If a suit is to obtain one or more of the reliefs mentioned in sec. 92 (1) of the Code in respect of a wakf for a "public purpose," it must be brought with the sanction of the Advocate-General as provided by that section, but not if the wakf is not for a "public purpose." A suit in respect of a private imambara is not a suit in respect of a wakf for a "public purpose" (a). Nor is a suit in respect of a wakf where the effect of the deed of wakf is to give the property in substance to the settlor's family (b). But a wakf for a mosque or a *khankah* is a wakf for a public purpose, and a suit in respect of it must be brought in accordance with the provisions of that section (c).

(v) Charitable and Religious Trusts Act XIV of 1920.

See notes to sec. 171A.

(vi) Mussalman Wakf Act XLII of 1923.

See sec. 171A.

(vii) Bengal Wakfs Act, 1934, Beng. Act XIII of 1934.

See sec. 171A.

(viii) Mussalman Wakf (Bombay Amendment) Act, 1935; Bombay Act XVIII of 1935.

(ix) United Provinces Muslim Wakfs Act, 1936, U. P. Act XIII of 1936.

See sec. 171A.

(y) *Muhammad Yusuf v. Muhammad Shaf* (1935) All.L.J. 40, 153 I.O. 344, ('34) A.A. 1013; *Delroos Banoo v. Kasse Abdoo Rahman* (1875) 15 Beng. L.R. 167, 25 W.R. 453.  
(z) *Majumdar v. Dadabhai* (1934) 36 Bom. L.R. 1098, 154 I.O. 684, ('34) A.B. 495; *Janfar Mohi-ud-din Sahib v. Afti Mohi-ud-din Sahib* (1864)

2 Mad.H.O. 19.  
(a) *Asghar Ali v. Delroos Banoo* (1877) 3 Cal. 324.  
(b) *Muhammad Shafiq v. Muhammad* (1929) 51 All. 30, 111 I.O. 93, ('28) A.A. 660.  
(c) *Syed Shah v. Syed Abi* (1932) 11 Pat. 288, 244-245, 186 I.O. 417, ('32) A.P. 33.

## CHAPTER XIII.

### PRE-EMPTION.

**Sa.** 177-179 **177. Pre-emption.**—The right of *shufaa* or pre-emption is a right which the owner of an immovable property possesses to acquire by purchase another immovable property which has been sold to another person.

*Hidayat*, 547; *Baillie*, 475.

It has been held in Calcutta (*a*) and Bombay (*b*), that the right of pre-emption is a right of *re-purchase* from the buyer. In Allahabad (*c*), it has been held that it is an *incident of property*.

**178. Law of pre-emption not applied in the Madras Presidency.**—The Mahomedan law of pre-emption is applied by the Courts of British India to Mahomedans as a matter of “justice, equity and good conscience,” except in the Madras Presidency where the right of pre-emption is not recognized at all [unless by local custom as in Malabar (*d*)]. The reason given by the Madras High Court in the earliest case on the subject for refusing to recognize the right is that the law of pre-emption places a restriction upon the liberty to transfer property, and is therefore opposed to “justice, equity and good conscience.” The right of pre-emption in that case was claimed on the ground of vicinage (*e*).

In a Rangoon case the parties were Madras Mahomedans by origin and the right of pre-emption was claimed on the ground of co-ownership. The High Court of Rangoon upheld the plaintiff's claim for pre-emption on the ground that the case was covered by sec. 13, sub-section (1), of the Burma Laws Act (*f*).

See notes to sec. 5 above.

**179. Special Acts.**—The law of pre-emption in the Punjab is regulated by the Punjab Pre-emption Act I of 1913, which has since 1924 been extended with modifications to the North-West Frontier Province. It is regulated in Oudh by the Oudh Laws Act XVIII of 1876, and in Agra by the Agra Pre-emp-

(a) *Kudratulla v. Mahini Mohan* (1869)

4 Beng. L. R. 134.

(b) *Hamaduya v. Benjamin* (1929) 53

Bom. 525, 532-533, 118 I.O. 543,

(20) A.B. 208.

(c) *Gobind Dayal v. Inayatullah* (1885)

7 All. 775.

(d) *Krishna Menon v. Kesavan* (1897)

20 Mad. 305.

(e) *Ibrahim v. Muni Mir Udin* (1870)

6 M.H.O. 28.

(f) *Syed Ibrahim v. Syed Khan* (1926) 4

Rang. 13, 95 I.O. 83, (26) A.

B. 79.

tion Act XI of 1922. These Acts apply to Mahomedans as **Ch. XIII,** well as non-Mahomedans, with the result that the rules of the **Sa** Mahomedan law of pre-emption do not apply even to Mahomedans in those places except on the footing of local custom (*g*). By section 3 of the Agra Act, however, there is a saving of the provisions of Mahomedan Law in certain cases where the vendor and the pre-emptor are both Mahomedans.

**180. Pre-emption among Hindus.**—The right of pre-emption is recognized *by custom* among Hindus who are either natives of, or are domiciled in (*h*), Behar (*i*), Sylhet (*j*) and certain parts of Gujarat, such as Surat, Broach and Godhra (*k*), and it is governed by the rules of the Mahomedan law of pre-emption except in so far as such rules are modified by such custom (*l*).

Where the existence of any such custom is generally known and judicially recognized, it is not necessary to assert or prove it (*m*).

Under the Mahomedan law, non-Mahomedans are as much entitled to exercise the right of pre-emption as Mahomedans: Baillie, 477. Therefore, during the Mahomedan rule in India, claims for pre-emption were entertained by the Courts of the country, whether they were preferred by or against Hindus. In this way, the Mahomedan law of pre-emption came to be the customary law of Behar and Gujarat. The law of pre-emption as applied to Hindus in those places was the Hanafi law, the Mahomedan sovereigns of India being Sunnis of the Hanafi sect, and the same law is now applied to them in cases of pre-emption. But it is a necessary condition of the application of the Mahomedan law of pre-emption to Hindus in Behar and Gujarat that they should be either natives of, or domiciled in, those places. It is not enough that the party is a Hindu and owns immovable property in those places. Thus in a Calcutta case the right of pre-emption was denied to a Hindu who was a co-sharer of certain immovable property in Behar, but who was neither a native of, nor domiciled in, that place (*n*). See notes to sec. 180A below. As to a summary of the law in the Bombay Presidency, see the under-mentioned case (*o*).

- (*g*) Wilson's Digest of Anglo-Muhamma-  
dan Law, s 353.  
(*h*) *Parasakh Nath v. Dhanai* (1905) 32  
Cal. 988.  
(*i*) *Fakir Rawat v. Emambakh* (1863)  
Beng. L.R. Sup. Vol. 35; *Jadu  
Lal v. Janki Koor* (1912) 39 Cal.  
915, 39 I.A. 101, 15 I.C. 659;  
*Ramautar Singh v. Brijkishore* ('33)  
A.P. 653, 149 I.C. 931; *Kaykishore  
Kuer v. Mohammad Qayum* (1942)  
198 I.C. 890, (42) A.P. 366.  
(*j*) *Geerachandra Bhatiacharaya v. Rabhu-  
dranath Das* (1934) 61 Cal. 694, 156  
I.O. 512, ('35) A.C. 17.  
(*k*) *Gordhandas v. Prankor* (1869) 6 B.  
H.O.A.C. 263, read with *Dahyabhai  
v. Chunilal* (1914) 38 Bom. 183,  
185-188, 22 I.O. 289; *Jagjeevan v.  
Kaidas* (1921) 45 Bom. 604, 40 I.  
O. 901, ('21) A.B. 188 [Surat—  
as to houses only, and not agricultural  
lands]; *Gokuldas v. Partab*  
(1916) 18 Bom. L.R. 693, 85 I.O.

- 871 [Godhra]; *Mahomed v. Narayan*  
(1916) 40 Bom. 358, 32 I.C. 933  
[not in Khandesh]; *Sitaram v. Sayed  
Sirajul* (1917) 41 Bom. 636, 649, 42  
I.C. 32 [not in Kolaba]; *Motilal v.  
Harid* (1920) 44 Bom. 698, 57 I.  
O. 590 [Ahmedabad]; *Ram Chand  
v. Gossams* (1923) 45 All. 501, 74  
I.C. 379, ('23) A.A. 513 [Benares  
—in respect of houses only, not agri-  
cultural lands].  
(*l*) *Chakruri v. Sindari* (1900) 28 All.  
590; *Jai Kuar v. Heera Lal* (1874)  
7 N.W.P. 1, *Jagunnath v. Indrapal*  
(1935) All. L.J. 108, 153 I.  
O. 172, ('35) A.A. 236.  
(*m*) *Jadu Lal v. Janki Koor* (1908) 35  
Cal. 575; 61 Cal. 694, *supra*.  
(*n*) *Parasakh Nath v. Dhanai* (1905) 32  
Cal. 988.  
(*o*) *Hamidmusa v. Benjamin* (1929) 53  
Bom. 525, 540-542, 118 I.C. 548,  
('29) A.B. 206.

**Ss.** 180A. Pre-emption by contract.—(1) Rights of pre-emption may be created by contract between the sharers in a village (p).

(2) A Mahomedan vendor may agree with a Hindu purchaser that the Mahomedan law of pre-emption applying between the vendor and his co-sharer also a Mahomedan, should be applicable to the purchase. Where such a contract is entered into, and the vendor informs his co-sharer about it, and the co-sharer makes the “demands” as required by law [s. 186], he is entitled to pre-emption against the purchaser, though the purchaser may be a Hindu (q).

*Introduction of the law of pre-emption into India.*—In *Digambar Singh v. Ahmad* (r) their Lordships of the Privy Council said: “Pre-emption in village communities in British India had its origin in the Mahomedan law as to pre-emption, and was apparently unknown in India before the time of the Moghul rulers. In the course of time customs of pre-emption grew up and were adopted among village communities. In some cases the sharers in a village adopted or followed the rules of the Mahomedan law of pre-emption, and in such cases the custom of the village follows the rules of the Mahomedan law of pre-emption. In other cases, where a custom of pre-emption exists, each village community has a custom of pre-emption which varies from the Mahomedan law of pre-emption and is peculiar to the village in its provisions and its incidents. A custom of pre-emption was doubtless in all cases the result of agreement amongst the shareholders of the particular village, and may have been adopted in modern times and in villages which were first constituted in modern times. Rights of pre-emption have in some provinces been given by Acts of the Indian Legislature. Rights of pre-emption have also been created by contract between the sharers in a village. But in all cases the object is, as far as possible, to prevent strangers to a village from becoming sharers in the village. Rights of pre-emption when they exist are valuable rights, and when they depend upon a custom or upon a contract, the custom or the contract, as the case may be, must, if disputed, be proved.”

**181. Who may claim pre-emption.**—The following three classes of persons and no others, are entitled to claim pre-emption, namely:—

(1) a co-sharer in the property (s) [*shafi-i-sharik*];

A *mukarridar* (lessee in perpetuity) holding under a co-sharer has no right to pre-empt as against another co-sharer (t);

(2) a participator in immunities and appendages, such as a right of way or a right to discharge water (u) [*shafi-i-khalit*]; and

(p) *Digambar Singh v. Ahmad* (1915) 87 All. 129, 141, 42 I.A. 10, 18, 28 I.C. 24.  
(q) *Sitaram v. Sayad Sirajul* (1917) 41 Bom. 636, 650-651, 42 I.C. 82.  
(r) (1915) 87 All. 129, 140-141, 42 I.A. 10, 18, 28 I.C. 84.  
(s) *Jadu Lal v. Janki Koor* (1912) 89 Cal. 915, 89 I.A. 101, 15 I.C. 659; *Syed Ibrahim v. Syed Khan*

(1926) 4 Rang. 13, 95 I.C. 83, ('26) A.R. 70 [co-heirs].  
(t) *Musammatt Bibi Salaha v. Haji Amr-uddin* (1929) 8 Pat. 251, 117 I.C. 665, ('29) A.P. 214.  
(u) *Karim v. Priya Lal* (1905) 28 All. 127; *Shivshankar v. Lachman* (1943) 45 Bom.L.R. 78, ('43) A.B. 89.

- (3) owners of adjoining immovable property (*v*) [*shafi-i-jar*], but not their *tenants* (*w*), nor persons in possession of such property without any *lawful title* (*x*) [Baillie, 481].

The first class excludes the second, and the second excludes the third. But when there are two or more pre-emptors belonging to the same class, they are entitled to equal shares of the property in respect of which the right is claimed [Baillie, 500].

**Exception.**—The right of pre-emption on the third ground, *viz.*, that of *ricinage* does not extend to estates of large magnitude, such as villages and zemindaris, but is confined to houses, gardens, and small parcels of land (*y*). The right, however, may be claimed by a *co-sharer* (*z*).

[(a) *A*, who owns a piece of land, grants a building lease of the land to *B*. *B* builds a house on the land, and sells it to *C*. *A* is not entitled to pre-emption of the house, though the land on which it is built belongs to him, for he is not a co-sharer, nor a participator in the appendages of the house, *abn* an owner of adjoining property: *Pershad Lal v. Irshad Ali* (1870) 2 N.W.P. 100

(b) *A* owns a house which he sells to *B*. *M* owns a house towards the north of *A*'s house, and is entitled to a right of way through that house. *N* owns a house towards the south of *A*'s house, separated from *A*'s house by a party wall, and having a right of support from that wall. Both *M* and *N* claim pre-emption of the house sold to *B*. Here *M* is a participator in the appendages, while *N* is merely a neighbour, for the right of collateral support is not an appendage of property. *M* is therefore entitled to pre-emption in preference to *N*: see *Ranchoddas v. Jugaldas* (1899) 24 Bom. 414; *Kartm v. Prityo Lal* (1905) 28 All. 127. It is immaterial that *M*'s right of way has not been perfected by prescription under the Easements Act. In such a matter the rules of Mahomedan law are to be applied, and that law does not prescribe any period which would give a person the right to enjoy an immunity, such as a right of way (*a*).

**Note.**—In the above illustration, the house owned by *M* is a dominant heritance, and the pre-empted house is a servient heritance, for *M* has a right of way through it. But *M* would not the less be a "participator in the appendages," if the pre-empted property was the dominant heritance and his property was the servient heritance: *Chand Khan v. Navmat Khan* (1869) 3 B.L.R.A.C. 296. And *M* would still be a "participator," if his house and the pre-empted house were both dominant tenements having a right of easement against a third property: *Mahatab Singh v. Ramtahal* (1868) 6 Beng.L.R. at p. 43 (foot-note).

- (v) *Azis Ahmad v. Nazir Ahmad* (1928) 50 All. 257, 103 I.O. 897, ('27) A.A. 504; *Abdul Shakur v. Abdul Ghafur* (1910) 7 All.L.J. 641, 6 I.O. 355.  
(w) *Goeman Sing v. Tripool Sing* (1867) 8 W.R. 437.  
(z) *Behares Ram v. Sheobhudra* (1868) 9 W.R. 455.  
(y) *Mahomed Hossein v. Mohsin Ali* (1870) 6 B.L.R. 41, 50; *Abdul Rahim v. Kharag Singh* (1892) 15 All. 101;

- Munna Lal v. Hajira Jan* (1910) 33 All. 28, 7 I.C. 404  
(s) *Sikaram v. Sayad Surajul* (1917) 41 Bom. 636, 652-653, 42 I.O. 32; *Jadu Lal v. Janki Koor* (1912) 39 Cal. 915, 39 I.A. 101, 15 I.O. 659 [Mahal]; *Said-ud-din v. Latif-un-nissa* (1922) 44 All. 114, 64 I.C. 456, ('22) A.A. 391 [Zemindari].  
(a) *Baldeo v. Badri Nath* (1909) 31 All. 519, 2 I.C. 458.



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(c) *A* is the owner of a plot of land. *B* and *C* own a piece of land adjoining it. The land owned by *B* and *C* is divided by a *kachcha* road. The public have a right of passage over that road, but the land along which the road runs belongs to *B* and *C*. *B* and *C* sell the land to *D*. *A* is entitled to pre-empt the whole of the land belonging to *B* and *C*, and not merely the portion on his side of the road: *Aziz Ahmad v. Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504.]

*Hedaya*, 548-550; *Baillie*, 481, 484, 500.

*Right of pre-emption arises from ownership.*—The right of pre-emption cannot be resisted on the ground that the pre-emptor was not in possession of his own property at the date of the suit. It is *ownership*, and not *possession*, that gives rise to the right (*b*). Therefore a *mukarraridar* under a co-sharer or a permanent tenant has no right of pre-emption (*c*), while a *birdar* who holds a rent-free grant has the right (*d*).

*Full ownership in land pre-empted.*—There must be also full ownership in the land pre-empted, and therefore the right of pre-emption does not arise on the sale of a leasehold interest in land (*e*).

*Pre-emptors of same class.*—When pre-emption is claimed by two or more persons on the ground of participation in a right of way, all the pre-emptors have equal rights, although one of them may be a contiguous neighbour (*f*). The reason is that the Mahomedan law does not recognize degrees of nearness in the same class of pre-emptors (*g*). But nearness may be recognized by custom (*h*).

*Vendee in the category of pre-emptors.*—The same rule applies if the vendee is himself in the category of pre-emptors. The property is in that case equally divided between the vendee and the pre-emptor (*i*).

*Tree with overhanging branches.*—The fact that the branches of a tree project over the land of a neighbour does not give the owner of the tree any right as a *shafi-khalit* on a sale of that land (*j*).

*Villages and zemindaris.*—The reason why the right of pre-emption cannot be claimed when the contiguous estates are of large magnitude is that the law of pre-emption "was intended to prevent vexation to holders of small plots of land who might be annoyed by the introduction of a stranger among them." But this principle applies only when the right of pre-emption is claimed merely on the ground of *vicinage*. It does not apply where the right is claimed by a co-sharer. See the section.

*Female.*—A female is not precluded from maintaining a suit for pre-emption, if she by law is entitled to inherit, even though it may be a widow's estate (*k*). But a female entitled to maintenance only is not entitled to pre-empt (*l*).

(b) *Sakina Bibi v. Amiran* (1888) 10 All. 472.

(c) *Mt. Bibi Saleha v. Haji Amiruddin* (1929) 8 Pat. 251, 117 I.C. 865, ('29) A.P. 214, *Dashrathmal Chaganmal v. Bai Dhondubai* (1941) Bom. 460, 43 Bom.L.R. 581, ('41) A.B. 262

(d) *Chariter v. Bhagwats* (1934) 152 I.C. 983, ('34) A.P. 596.

(e) *Baboo Ram Golam Singh v. Nurnang Sahoy* (1876) 25 W.R. 48, (relied on in *Dashrathmal Chaganmal v. Bai Dhondubai*) *ibid*

(f) *Karim Baksh v. Khuda Baksh* (1894) 16 All. 247. See also *Bachan Singh v. Bijai Singh* (1926) 48 All. 221, 90 I.C. 228 ('26)

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(g) *Said-ud-din v. Latif-un-nissa* (1922) 44 All. 114, 116-117, 64 I.C. 456, ('22) A.A. 391; *Nageshar v. Ram Harakh* (1924) 46 All. 870, 79 I.C. 417, ('24) A.A. 541

(h) *Dhanraj v. Rameshwar* (1923) 46 All. 170, 78 I.C. 904, ('24) A.A. 227. (i) *Ramautar Singh v. Brijkshore* ('33) A.P. 653, 149 I.C. 931.

(j) *Aziz Ahmad v. Nazir Ahmad* (1928) 50 All. 257, 103 I.C. 897, ('27) A.A. 504.

(k) *Ishar Devi v. Sheo Ram* (1924) 5 Lah. 435, 84 I.C. 484, ('25) A.L. 83

(l) *Karan Singh v. Muhammad* (1885) 7 All. 260; *Bhupal v. Mohan* (1897) 10 All. 202

*Sale by one of several co-sharers to another.*—See sec. 185 below.

**Shia law.**—By the Shia law the only persons entitled to the right of pre-emption are co-sharers; Baillie, II, 179; *Qurban v. Chote* (m), and that too if the number of co-sharers does not exceed two (n). Ch. XIII,  
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**182. Sale alone gives rise to pre-emption.**—The right of pre-emption arises only out of a valid (o), complete (p), and *bona fide* (q) sale. It does not arise out of gift (*hiba*), *sadaqah* (s. 144), wakf, inheritance, bequest (r), or a lease even though in perpetuity (s). Nor does it arise out of a mortgage even though it may be by way of conditional sale (t); but the right will accrue, if the mortgage is foreclosed (u). An exchange of properties between two persons subject to an option to either of them to cancel the exchange and take back his property at any time during his life, stands on the same footing as a conditional sale; such an exchange does not extinguish the ownership in the property, and does not give rise to the right of pre-emption. But if one of the parties dies without cancelling the exchange, the transaction will mature into two sales and will give rise to the right of pre-emption (v). It has been held by the High Court of Allahabad that a transfer of property by a husband to his wife in lieu of dower is a sale, and is therefore subject to a claim for pre-emption (w). On the other hand, the Chief Court of Oudh has held that the transaction amounts to a *hiba-bil-iwaz*, and no claim for pre-emption can therefore arise (x). The right of pre-emption arises not only out of a private sale, but also out of a sale by the Court or a receiver (y).

*Explanation I.*—According to the Mahomedan law a sale is an exchange of property for property with the mutual consent of the parties, the exchange consisting in payment of price by the purchaser to the vendor and delivery of possession by the vendor to the purchaser. The execution of an

(m) (1899) 22 All. 102.

(n) *Abbas Ali v. Maya Ram* (1888) 12 All. 229; *Buxain Bakhsh v. Mahfuz-ul-Haq* (1925) 47 All. 944, 88 I.O. 972, ('25) A.A. 559.

(o) *Hedaya*, 560; Baillie, 475-477; *Najm-un-nissa v. Afroz Ali* (1900) 22 All. 343 [where the price was not ascertained at the date of the contract].

(p) *Hedaya*, 560; Baillie, 475-477.

(q) *Parashthi Nath v. Dhanat* (1905) 32 Cal. 988.

(r) Baillie, 471.

(s) *Deuonustulla v. Kasem Molla* (1887) 15 Cal. 184.

(t) *Gurdial v. Teknarayan* (1865) B.L.R. Sup. Vol. 166.

(u) *Batal Begam v. Mansur Ali* (1901) 24

All. 17.

(v) *Muhammad Yunis v. Muhammad* (1931) 53 All. 169, 180 I.O. 295, ('31) A.A. 106.

(w) *Fida Ali v. Musafar Ali* (1882) 5 All. 65; *Nathu v. Shadi* (1915) 87 All. 522, 29 I.O. 498, doubted by *Ameer Ali*, 4th ed., Vol. I, p. 713.

(x) *Bashir Ahmad v. Musamat Zubaida* (1926) 1 Luck. 83, 92 I.O. 265, ('26) A.O. 186; *Chaudhri Talib Ali v. Musamat Kanu* (1927) 2 Luck. 875, 102 I.O. 142, ('27) A.O. 204.

(y) *Brj Narain v. Kedar Nath* (1923) 45 All. 189, 71 I.O. 839, ('23) A. A. 57.

**§. 182** instrument of sale is not necessary (z). According to the Transfer of Property Act, 1882, sec. 54, a sale of property of the value of Rs. 100 and upwards is not complete unless made by a registered instrument. It has been held by a Full Bench of the Allahabad High Court that, although the rules of the Mahomedan law of sale have been superseded by the provisions of the Transfer of Property Act, the question whether a sale is complete so as to give rise to the right of pre-emption is to be determined by applying the Mahomedan law, and if a complete sale is effected under that law as where the price is paid and possession is delivered, the right of pre-emption will arise, though the sale may not be complete under the Transfer of Property Act (a). On the other hand, some judges have expressed the opinion that the right of pre-emption does not arise until after registration as required by the Transfer of Property Act (b). In *Jadu Lal v. Janki Koer* (c), Brett, J., suggested that a solution of the problem was to be found in determining in each case what was the intention of the parties as to the date when the sale should be considered as complete. The rule suggested by Brett, J., was adopted by some judges in Calcutta (d) and Patna (e) and also by the High Court of Bombay in *Sitaram v. Sayad Sirajul* (f). The decision of the Bombay Court in *Sitaram's* case was affirmed on appeal by the Judicial Committee. In the course of the judgment their Lordships of the Privy Council said: "You are to look at the intention of the parties (that is, the vendor and the vendee) in determining what system of law was to be taken as applying and what was to be taken to be the date of the sale with reference to which the ceremonies were performed" (g). In a case decided while *Sitaram's* case was under appeal the Bombay High Court followed the Full Bench decision of the Allahabad High Court (h). In a later case the Calcutta High Court said that if there is nothing to indicate what the intention of

(z) *Hedaya*, 241; Macnaghten, 42; Baillie, 476; *Begam v. Muhammad* (1894) 16 All. 244, 246-248.

(a) *Begam v. Muhammad* (1894) 16 All. 344 [F.B.]; *Najm-un-nissa v. Ajab Ali* (1900) 22 All. 343; *Janki v. Girjadat* (1885) 7 All. 432 [F.B.].

(b) Banerji, J., in (1894) 16 All. 345, 356 [F.B.]; *infra*: Cornduff, J., *Budhai v. Sonoullah* (1914) 41 Cal. 943, 949, 23 I.O. 385; Mellick, J., in *Kheyah v. Mullick* (1916) 1 Pat.L.J. 174, 177-178, 34 I.O. 210.

(c) (1908) 35 Cal. 575, 589, *affmd.* in (1912) 39 Cal. 915, 39 I. A. 191, 15 I.O. 659.

(d) Richardson, J., in (1914) 41 Cal. 943, 953, 23 I.O. 385, *supra*.

(e) Roe, J., in (1918) 1 Pat.L.J. 174, 179, 34 I.O. 210, *supra*.

(f) (1917) 41 Bom. 636, 651-652, 42 I.O. 32.

(g) *Sitaram v. Jauhal Hasan* (1921) 45 Bom. 1056, 48 I.A. 475, 481, 64 I.O. 826, ('23) A. P.O. 41.

(h) *Abdulla v. Ismail* (1922) 46 Bom. 302, 64 I.O. 918, ('23) A.B. 124.

the parties was, the right of pre-emption arises on registration (i).

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*Explanation II.*—It has been held by the High Court of Allahabad that the right of pre-emption arises not only when an out-and-out sale has been completed, but also when a complete contract of sale, without any option to the vendor, has been made (j).

The importance of the question now under consideration arises in this way. A Mahomedan is not entitled to pre-emption unless he makes the "demands" required by law (s. 186). These demands should not be made before the sale is completed. They should be made after the sale is completed, and immediately after the pre-emptor hears of the sale, that is, a completed sale. Now a sale according to the Mahomedan law is completed by payment of the price by the purchaser to the vendor and by delivery of possession by the vendor to the purchaser. But a sale under the Transfer of Property Act is not complete unless made by a registered instrument. Hence the view taken by some Judges that the "demands" should be made after registration of the sale-deed. But if this view be accepted, the vendor and vendee, with a view to defeat the pre-emptor, may not execute and register a sale deed, and may complete the transaction by payment of price and delivery of possession so as to deprive the pre-emptor of the right of pre-emption. Hence the rule suggested by Brett, J., and approved by the Judicial Committee, namely, to ascertain in each case what was the intention of the parties as to the date when the sale should be considered as completed.

A agrees to sell his house to B in January 1918 for Rs. 300. On the 1st February 1918 B pays the purchase-money to A, and obtains possession of the house from A. The sale-deed is registered on the 1st March 1918. The pre-emptor comes to know of the payment of price and delivery of possession on the 15th February 1918, but he does not make the demands (s. 186) until the 2nd March 1918, being the date on which he first comes to know of the registration. Is he entitled to pre-emption? (1) No, according to the Allahabad High Court (k), for the sale, according to that Court, became complete on payment of the price and delivery of possession, and the pre-emptor having failed to make the "demands" on the 15th February when he first came to know of it, the right of pre-emption is lost by delay. (2) If the sale be regarded as complete on registration, the pre-emptor is entitled to pre-emption, for he made the "demands" when he first came to know of the registration. In fact, if he had made the "demands" before registration they would have been premature, and he would not have been entitled to pre-emption unless he made the "demands" again immediately after he came to know of registration. (3) According to the rule now laid down by the Judicial Committee, the intention of the parties is the sole guide. Therefore, if in the case put above, possession was not given and no part of the price was paid till registration, the intention of the parties would be taken to be that they did not regard the sale to be complete till registration, and the "demands" in such a case should be made immediately after the pre-emptor hears of the registration (l). But if the contract of sale says, "I have agreed to sell you my

(i) *Nareschandra Dutta v. Gireschandra Das* (1898) 62 Cal. 979, 180 I.C. 730, ('88) A.O. 17.

(j) *Zamani Begum v. Khan Muhammad* (1924) 46 All. 142, 81 I.C. 586, ('24) A.A. 251, follg. *Begum v. Muhammad* (1894) 18 All. 244,

347 [F.B.].  
(k) *Begum v. Muhammad* (1894) 18 All. 244 [F.B.].

(l) *Jadu Lal v. Janki Koor* (1908) 85 Cal. 575; *Budhai v. Sonaulah* (1914) 41 Cal. 948, 950, 954, 23 I.C. 885.

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share for Rs. 29,000, Rs. 1,000 paid down, and the remainder payable in two quick instalments, and that a formal deed of sale shall be executed and registered," and the agreement further contemplates a notice of the transaction to be given by the vendor to his co-sharer on the same day, and provides that if the co-sharer elects to purchase the vendor's share, the vendor should immediately return the Rs. 1,000 to the purchaser, it is the date of the agreement that is to be taken as the date of the sale and it is with reference to that date that the co-sharer (pre-emptor) should perform the necessary ceremonies (m).

*Lease in perpetuity.*—A lease even though in perpetuity does not give rise to the right of pre-emption. The Allahabad High Court has, however, held that a transaction, though in form a lease, may in truth and substance be a sale, as where the property is of the value of Rs. 2,000 and a lease is given for 99 years under which Rs. 1,950 are paid as premium and Re. 1 is reserved as annual rent. In such a case the pre-emptor is entitled to pre-emption, though the transaction is in form a lease. The Mahomedan law does not recognize the device of dressing up a transaction of sale in the garb of a lease so as to defeat the right of pre-emption (n). It is difficult to see how on the facts stated above, the lease could be regarded as a sale. See sec. 192 below.

The principle that a Court in determining whether a right of pre-emption exists should look to the real nature of the transaction is well established. A deed purporting to be a *shankalap* or gift to a guru but which is really a sale gives rise to a right of pre-emption (o); and so does an ostensible usufructuary mortgage which is really a sale (p). The Oudh Laws Act gives a right of pre-emption on the sale of a proprietary or under-proprietary tenure and the Chief Court has held that a transaction described as a permanent lease by which a superior proprietor carves out underproprietary rights heritable and transferable without reserving a right of re-entry amounts to a sale of an underproprietary tenure and gives rise to a right of pre-emption (q). Under the same Act a member of the village community is entitled to pre-empt and a lessee with heritable and transferable rights has been held to be a member of the village community and entitled to pre-empt (r).

**183. Ground of pre-emption must continue until the decree is passed.**—The right in which pre-emption is claimed—whether it be co-ownership, or participation in appendages, or vicinage—must exist not only at the time of sale, but at the date of the suit for pre-emption (s), and it must continue up to the time the decree is passed (t). But it is not necessary that the right should be subsisting at the date of the execution of the decree (u) or at the date of the decree of the appellate Court (v). The reason is that the crucial date in

- (m) *Sularam v. Jiaul Hasan* (1921) 45 Bom 1056, 48 I.A. 475, 64 I.C. 826, ('23) A.P.O. 41  
(n) *Muhammad v. Muhammad* (1918) 40 All 322, 44 I.C. 227.  
(o) *Pandit Bhagwan Dutt v. Brij Bhukhan* (1935) 10 Luck 289, 152 I.C. 666, ('35) A.O. 27.  
(p) *Bhagwana v. Shadi* (1934) 16 Lah. 408, 155 I.C. 654, ('34) A.L. 878.  
(q) *Japdeo Singh v. Ram Narresh Singh* (1935) 10 Luck. 892, 153 I.C. 334, ('35) A.O. 217.  
(r) *Bhagwati Prasad v. Balgovind* (1935) 17

- 8 Luck 377, 142 I.C. 885, ('38) A.O. 181  
(s) *Janki Prasad v. Ishar Das* (1899) 21 All 374  
(t) *Rana Gopal v. Puri Lal* (1899) 21 All. 441; *Tajuzzul v. Thak Singh* (1910) 32 All 567, 6 I.C. 426; *Nuri Mian v. Ambica Singh* (1917) 44 Cal. 47, 34 I.C. 869.  
(u) *Ram Sahai v. Giaya* (1894) 7 All. 107  
(v) *Baldeo Muir v. Ram Lagan* (1923) 45 All 709, 77 I.C. 694, ('24) A. 82, *Umrav v. Lachman* (1924) 46 All. 321, 79 I.C. 217, ('24) A. 448

these cases is the date of the decree of the Court of first instance (w). Ch. XIII.  
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Thus if a plaintiff, who claims pre-emption as owner of a contiguous property, sells his property to another person *after institution of the suit*, he will not be entitled to a *decree*, for he does not then belong to any of the three classes of persons to whom the right of pre-emption is given by law: see sec. 181 above. Similarly if a co-sharer or a pre-emptor of a superior class enforces his right while the suit is pending the plaintiff will not be entitled to a decree; but if the pre-emptor allows his right to become time-barred, a decree in favour of the plaintiff may be passed (x). But once the *decree* is passed, the plaintiff does not forfeit the right of being put into possession of the pre-empted property in execution of the decree, although he may have alienated the property *before execution* or alienated it before the date of the decree of the appellate Court. It need hardly be mentioned that a plaintiff does not forfeit his right of pre-emption merely because he had on a previous occasion mortgaged his own share on which his right of pre-emption depends (y).

**184. Doubt as to whether buyer should be a Mahomedan.**—According to the Allahabad (z) and Patna (a) decisions, it is not necessary, to enforce the right of pre-emption, that the buyer should be a Mahomedan. According to the Calcutta (b) and Bombay (c) decisions, the buyer must be a Mahomedan except in the cases mentioned in secs. 180 and 180A. All the three Courts, however, are agreed that the seller and the pre-emptor should both be Mahomedans (d).

There are no Madras decisions, because in Madras the law of pre-emption is not applied even as between Mahomedans [s. 178].

The vendor should be a Mahomedan. Hence no right of pre-emption can be claimed by a Mahomedan when the vendor is a Hindu or a European, though the vendee may be a Mahomedan.

The pre-emptor also should be a Mahomedan, the reason being that if he is a Mahomedan and subsequently wants to sell the pre-empted property, he is bound to offer it to his Mahomedan neighbours or partners before he can sell it to a stranger. But a non-Mahomedan is not subject to any such obligation, and he can sell it to any one he likes. The law of pre-emption contemplates both a right and an obligation, and if a non-Mahomedan were allowed to pre-empt, it would be allowing him the right without the corresponding obligation. This is the principle underlying the decision of the Allahabad High Court in *Qurban's case* (e), where it was held that a Shia Mahomedan could not maintain a claim for pre-emption based on the ground of *vicinage* when the vendor

(w) (1923) 45 All. 709, 710, 77 I.C. 694, ('24) A.A. 82, *supra*; *Haji Sultan v. Maaitu* (1926) 48 All. 689, 96 I.C. 744, ('26) A.A. 749; *Sri Thakur Radhika v. Bohra Shiam* (1923) 45 All. 561, 74 I.C. 382, ('23) A.A. 526.  
(x) *Sheik Salamat Ali v. Nur Mahomed* (1934) 9 Luck. 475, 149 I.C. 258, ('34) A.O. 303.  
(y) *Ujagar Lal v. Jia Lal* (1896) 18 All. 382.  
(z) *Govind Dayal v. Inayatullah* (1885) 7 All. 775 F.B.; *Abbas Ali v. Maya Ram* (1888) 12 All. 229.  
(a) *Achutananda v. Biki* (1922) 1 Pat. 578, 69 I.C. 666, ('22) A.P. 601.

(b) *Kudratulla v. Mahni Mohan* (1869) 4 Beng.L.R. 134.  
(c) *Sitaram v. Sayad Surajul* (1917) 41 Bom. 636, 649-650, 42 I.C. 32; *Mahomed v. Narayan* (1916) 40 Bom. 358, 32 I.C. 933; *Hamed-miya v. Benjamin* (1929) 53 Bom. 525, 118 I.O. 548, ('29) A.B. 206 [buyer a Bene Jarnal].  
(d) *Dwarkan Das v. Hussain Baksh* (1878) 1 All. 564 (Hindu vendor); *Poorno Singh v. Hurrychurn* (1872) 10 B.L.R. 117 (European vendor); *Qurban v. Chole* (1899) 22 All. 102 (Shia pre-emptor against Sunni vendor and Sunni vendee).  
(e) (1899) 22 All. 102, *supra*.

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is a Sunni. The decision was based on the ground that by the Shia law a neighbour as such has no right of pre-emption, and that if he were allowed to pre-empt, he might sell his house to anyone he liked, and his Sunni neighbours could not successfully assert any right of pre-emption against him.

The vendee also, according to the Calcutta High Court, should be a Mahomedan. Hence a Mahomedan cannot obtain pre-emption of property sold by a Mahomedan to a Hindu. According to that decision, the right of pre-emption is not a right that attaches to the land, but is merely a personal right. If it were a right attaching to the land, it might be claimed, even against a Hindu or any other non-Mahomedan purchaser. "We cannot, . . . in justice, equity and good conscience, decide that a Hindu purchaser in a district in which the custom of pre-emption does not prevail as amongst Hindus, is bound by the Mahomedan law, which is not his law, to give up what he has purchased to a Mahomedan pre-emptor." On the other hand, it has been held by the Allahabad High Court that it is not necessary that the vendee should be a Mahomedan and that pre-emption can therefore be claimed even against a Hindu purchaser. According to that Court, a Mahomedan owner of property is under an obligation imposed by the Mahomedan law to offer the property to his Mahomedan neighbours or partners before he can sell it to a stranger, and this is an incident of his property which attaches to it whether the vendee be a Mahomedan or a non-Mahomedan. The Bombay High Court has adopted the view taken by the High Court of Calcutta. According to the Calcutta and Bombay High Courts, the right of pre-emption may be enforced against a Hindu vendee, in those cases only where the right is recognized by custom as stated in sec. 180, or is created by contract as stated in sec. 180A.

**185. Pre-emption in the case of a sale to a shafi.**—Where there are two or more *shafis* of the same class, and the sale is made by one of them to another, the other *shafis* are entitled to claim pre-emption of their share against the *shafi* purchaser (*f*). Similarly, where the sale is made to a *shafi* and a stranger, the other *shafis* are entitled to claim pre-emption of their share against the *shafi*-purchaser and the stranger (*g*).

[(a) *A, B and C are co-sharers in certain property. A sells his share to B. C is entitled to claim pre-emption of one-half of the property: Enatullah v. Kowsher Ali* (1927) 54 Cal. 1. I.C. 220, ('26) A.C. 1153.

(b) *A, B, C and D own each a house situate in a private lane common to all the four houses. A sells his house to B. Here B, C and D are "participants in the appendages" of the house sold, the appendage being the right of way. C and D are each entitled to claim pre-emption of a third of the house: Amir Hasan v. Rahim Bakhsh* (1897) 19 All. 466.

(c) *A, B and C are co-sharers in certain property. A sells his share to B and S. C is entitled to claim pre-emption of one-half of the property sold: Saligram v. Raghubardyal* (1887) 15 Cal. 224.]

(f) *Amir Hasan v. Rahim Bakhsh* (1897) 19 All. 466; *Abdullah v. Amanat-ullah* (1899) 21 All. 292; *Muhammad Yakub v. Kanhai Lal* (1922) 44 All. 83, 64 I.O. 873, ('22) A.A. 157, dissenting on this point from *Baldoo v. Badri Nath* (1909) 31 All. 519; *Zia-ud-din v. Abdul* (1923) 45 All. 487, 77 I.O. 27, ('23) A.A. 520; *Nadir Hussain v. Sadig Hussain* (1926) 47 All. 324, 326, 86 I.C.

589, ('25) A.A. 861; *Vithaldas v. Jametram* (1920) 44 Bom. 887, 58 I.O. 279 [F.B.]; *Enatullah v. Kowsher Ali* (1927) 54 Cal. 266, 98 I.O. 220, ('26) A.O. 1159, overruling *Lalla Nowbut Lall v. Lalla Jewan Lall* (1878) 4 Cal. 831; *Rameswar Singh v. Brij Kishore* ('33) A.P. 653, 149 I.O. 931. (g) *Saligram v. Raghubardyal* (1885) 15 Cal. 224.

It was at one time held by the High Court of Calcutta (*h*), that where there are several co-sharers, and one of them sells his share to another, none of the other co-sharers is entitled to claim pre-emption against the purchaser. The ground of the decision was thus stated by Garth, C.J.: "The object of the rule (of pre-emption) . . . is to prevent the inconvenience which may result to families and communities from the introduction of a disagreeable stranger as a co-parcener or near neighbour. But it is obvious, that no such annoyance can result from a sale by one co-parcener to another." A different view was taken by the High Courts of Allahabad and Bombay, one of the grounds of the decisions being that the rule laid down in the *Hedaya*, that "when there is a plurality of persons entitled to the privilege of *shuffa*, the right of all is equal," applies as much when the sale is made to a *shafi* as when it is made to a stranger. A special Bench of the Calcutta High Court has now taken the same view as that taken by the Allahabad and Bombay High Courts (*i*).

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**186. Demands for pre-emption.**—No person is entitled to the right of pre-emption unless—

- (1) he has declared his intention to assert the right *immediately* on receiving information of the sale. This formality is called *talab-i-mowasibat* (literally, demand of jumping, that is, immediate demand); and unless
- (2) he has with the least practicable delay affirmed the intention, referring expressly to the fact that the *talab-i-mowasibat* had already made (*j*), and has made a formal demand—
  - (a) either in the presence of the buyer, or the seller, or on the premises which are the subject of sale (*k*), and
  - (b) in the presence at least of two witnesses (*l*). This formality is called *talab-i-ishhad* (demand with invocation of witnesses).

See note (3) below.

*Explanation I.*—The *talab-i-mowasibat* should be made after the sale is completed. It is of no effect if it is made before the completion of the sale [s. 182].

*Explanation II.*—It is not necessary that the *talab-i-mowasibat* or *talab-i-ishhad* should be made by the pre-emp-

(h) (1878) 4 Cal. 831, *supra*.  
 (i) (1927) 54 Cal. 265, 98 I.O. 220, ("26) A.C. 1158, *supra*.  
 (j) *Rufiub Ali v. Chundi Churn* (1890) 17 Cal. 543 F.R.; *Muborah Hussein v. Kanis Bano* (1904) 27 All. 160; *Jadu Lal v. Janki Koor* (1912) 39 Cal. 915, 923, 39 I.A. 101, 108, 15 I.O. 659, *affm.* (1908) 85 Cal. 575; *Sadiq Ali v. Abdul* (1928) 45 All. 290, 71 I.O. 460, ("28) A.A. 261; *Medni Proshad v. Su-*

*resh Chandra* (1942) 21 Pat. 795, 204 I.O. 41, ("43) A.P. 96.  
 (k) *Kulsum Bibi v. Faqir Muhammad* (1896) 18 All. 298; *Muhamma Uzman v. Muhammad Abdul* (1912) 34 All. 1, 11 I.O. 819.  
 (l) *Jadu Singh v. Raj Kumar* (1870) Beng. L. R. 171 A.C., 13 W.R. 177; *Ramdular Misser v. Jhumac Lal Misser* (1872) 8 Beng. L. R. 455, 17 W.R. 265.



- S. 186** tor in person. It is sufficient if it is made by a manager or a person *previously* authorized by the pre-emptor to make the demand (*m*). A demand made by the father or brother of the pre-emptor is not sufficient, even if he has a right to pre-empt, unless he had been previously authorized to make the demand (*n*). When the pre-emptor is at a distance, the demand may be made by means of a letter (*o*).

*Explanation III.*—If the *talab-i-ishhad* is made in the presence of the buyer, it is not necessary that the buyer should then be actually in possession of the property in respect of which pre-emption is claimed (*p*).

*Explanation IV.*—When two or more persons claim to pre-empt, each one of them should make the demands, unless one of them has also been authorized by the others to do so, and he makes the demands on their behalf also. If a suit is brought by several persons claiming to pre-empt, and only one of them has made the demand on his own behalf, the suit will proceed as regards him, but it must be dismissed as to the rest (*q*).

Where there are two or more buyers, and the *talab-i-ishhad* is not made in the presence of the vendor or on the property sought to be pre-empted, the demand must be made to all the buyers (*r*). If it is made only to some of them, the shares of those buyers only can be pre-empted (*s*) [s. 191].

*Explanation V.*—No particular formula is necessary either for the performance of *talab-i-mowasibat* or *talab-i-ishhad* so long as the claim is unequivocally asserted (*t*).

*Hedaya*, 550, 551; *Baillie*, 487-490.

(1) The *talab-i-mowasibat* is spoken of as the first demand, and the *talab-i-ishhad* as the second demand. The third demand consists of the institution of the suit for pre-emption. The *talab-i-mowasibat* and the *talab-i-ishhad* are conditions precedent to the exercise of the right of pre-emption (*u*). The

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| <p>(m) <i>Abadi Begam v. Imam Begam</i> (1877) 1 All 521; <i>Ah Muhammad v. Muhammad</i> (1896) 18 All 509; <i>Jadu Lal v. Janki Koor</i> (1912) 39 Cal. 915, 39 I.A. 101, 15 I. C. 659; <i>Harihar v. Sheo Prasad</i> (1884) 7 All 41 [pre-emptor bound by acts and omissions of his agents]. <i>Shamruddin v. Allauddin</i> (1931) All L.J. 1083, 134 I. C. 462, ('32) A. A. 138, [must be previously authorized].</p> <p>(n) <i>Shamruddin v. Allauddin</i> (1931) All. L.J. 1083, 134 I. C. 462, ('32) A. A. 138.</p> <p>(o) <i>Syed Wajid v. Lala Hanuman</i> (1869) 4 Beng. L.R., A. C. 138; <i>Muhammad v. Muhammad</i> (1916) 38 All.</p> | <p>201, 33 I. C. 349.</p> <p>(p) <i>Ah Muhammad v. Muhammad</i> (1896) 18 All. 509.</p> <p>(q) <i>Shamruddin v. Allauddin</i> (1931) All L.J. 1083, 134 I. C. 462, ('32) A. A. 138.</p> <p>(r) <i>Alman v. Ah Husain</i> (1923) 45 All. 449, 73 I. C. 1029, ('23) A. A. 355.</p> <p>(s) <i>Muhammad Askari v. Rahmatullah</i> (1927) 49 All 716, 105 I. C. 771, ('27) A. A. 548.</p> <p>(t) <i>Joy Deb v. Mahomed</i> (1905) 32 Cal. 982; <i>Muhammad Nasir v. Nakhudum</i> (1912) 84 All. 53, 11 I. C. 737.</p> <p>(u) <i>Deonandan Prasad v. Ramdhari</i> (1917) 44 Cal. 675, 683, 44 I. A. 80, 82, 39 I. C. 958.</p> |
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*talab-i-ishhad* is as indispensable as the *talab-i-mowasibat* (v). It is stated in the *Hedaya* (p. 550) that "the right of *shuffa* (pre-emption) is but a feeble right, as it is the disseizing of another of his property merely in order to prevent apprehended inconveniences" (see notes to s. 185 above). Hence the formalities must be strictly observed, and there must be a clear proof of their observance (w). A petition by the pre-emptor to the sub-registrar praying that the registration of the sale-deed may be stayed cannot be treated as a *talab-i-mowasibat* there being no assertion of the right of pre-emption (x). The *talab-i-mowasibat* should be made as soon as the fact of the sale is known to the claimant. A finding as to the promptness of the demand is a finding of fact which cannot be interfered with in second appeal (y). Any unreasonable or unnecessary delay will be construed as an election not to pre-empt (z). A delay of twelve hours was held in an Allahabad case to be too long (a). And it was held in a Calcutta case that where the pre-emptor, on hearing of the sale, "entered his house, opened his chest, took out Rs. 47 4" (evidently to tender the amount to the buyer), and then performed the *talab-i-mowasibat*, he was not entitled to claim pre-emption, for the delay was quite unnecessary (b) [s. 187].

(2) It is not necessary to the validity of *talab-i-mowasibat* that it should be performed in the presence of witnesses. It is enough if the pre-emptor makes known his intention in some way. But it is of the essence of *talab-i-ishhad* that it should be performed before witnesses (c). It is also necessary when the *talab-i-ishhad* is made that the pre-emptor should refer expressly to the fact of the *talab-i-mowasibat* having been previously made (d).

(3) *Talab-i-ishhad*.—In *Ganga Prasad v. Ajudhia* (e) the High Court of Allahabad held that to constitute a demand a valid *talab-i-ishhad* it was necessary that the witnesses should have been specifically called upon to bear witness to the demand being made. This was dissented from in two later Allahabad cases which held that the omission of this invocation addressed to the witnesses was not necessarily fatal (f). But the Calcutta High Court approves *Ganga Prasad's* case and considers that the witnesses must be asked to witness the demand by some such words as "be ye witnesses to this" (g). The reason of the judgment is that the enforcement of the right of pre-emption must be preceded by an observance of the preliminary forms prescribed by Mohammedan law (h). The Patna High Court has recently held that the invocation of the witnesses to bear testimony to the demand is an essential element of *Talab-i-ishhad* (h1). In a recent judgment (h2) the Bombay High Court has, dissenting from *Pachmuddin Nayak v. Abdul Gaffar* and approving *Imamuddin v. Muhammad* held that it is not obligatory under the Mahomedan Law to

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(v) *Muhammad v. Madho Prasad* (1917) 39 All. 133, 35 I.O. 911  
(w) *Jadu Singh v. Rajkumar* (1870) 4 B.L.R. A.C. 171.

(x) *Ehryoh v. Mullick* (1916) 1 Pat.L.J. 174, 34 I.O. 210

(y) *Nareeshchandra Dutta v. Gireeshchandra Das* (1936) 62 Cal. 979, 160 I.O. 739, ('36) A.O. 17

(z) *Baynath v. Ramdhari* (1908) 35 Cal. 402, 35 I.A. 60.

(a) *Ali Muhammad v. Taj Muhammad* (1876) 1 All. 283.

(b) *Jorfan Khan v. Jabbar Meak* (1884) 10 Cal. 383.

(c) *Ganga Prasad v. Ajudhia* (1905) 28 All. 24, *Pachmuddin Nayak v. Abdul Gaffar* ('37) A.O. 233, 163 I.O. 480; *Shivshanker v. Laxman* (1943) 45 Bom.L.B. 78, ('43) A.B. 83.

(d) *Mubarak Hussain v. Kanu Bano* (1904)

27 All. 160; *Sadiq Ali v. Abdul* (1923) 45 All. 290, 71 I.O. 460, ('23) A.A. 251

(e) (1904) 28 All. 24

(f) *Ahmad Hakim v. Muhammad* (1927) 49 All. 385, 100 I.O. 30, ('27) A.A. 289; *Imam-ud-din v. Muhammad* (1930) 62 All. 1005, 133 I.O. 304, ('31) A.A. 736.

(g) *Pachmuddin Nayak v. Abdul Gaffar* (1937) 42 C.W.N. 300, ('37) A.C. 283, 163 I.O. 480.

(h) *Fakir Rowot v. Emambakhsh* (1863) Beng. L.R. Sup. Vol. 35; *Jadu Lal v. Janki Koer* (1912) 39 I.A. 101, 89 Cal. 915, 15 I.O. 659.

(h1) *Madho Prasad v. Suresh Chandra* (1943) 61 Pat. 795, 204 I.O. 41, ('43) A.P. 96.

(h2) *Shivshanker v. Laxman* (1943) 45 Bom.L.B. 78, ('43) A.B. 83

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utter the formula "Be ye witnesses thereof". It is sufficient if the pre-emptor informs the witnesses of his right to pre-empt and the witnesses are taken to the purchaser for the purpose of attesting the Talab. It was further held that it was not necessary to tender the amount, and the demand would be valid if the pre-emptor expressed his desire to purchase the property at the same price as was paid by the purchaser, unless that price was not paid in good faith.

(4) The *talab-i-ishhad* may be combined with the *talab-i-mowasibat*. Thus if at the time of *talab-i-mowasibat*, the pre-emptor has an opportunity of invoking witnesses in the presence of the seller or the buyer or on the premises to attest the *talab-i-mowasibat*, and witnesses are in fact invoked to attest it, it will suffice for both the *talabs* (demands). This, however, is the only case in which the *talab-i-ishhad* may be combined with the *talab-i-mowasibat* (v).

(5) The *talab-i-mowasibat* may be made by using some such words as "I do claim my *shuffa*" (right of pre-emption): *Hedayat*, 551. The *talab-i-ishhad* may be made by the pre-emptor saying, "such a person has bought such a house of which I am the *shafee*; I have already claimed my privilege of *shuffa* and now again claim it: be therefore witness thereof": *Hedayat*, 551. But no particular form is necessary [*Hedayat*, 551]; what the law requires is that the demand must be to that effect and no more. If there are several purchasers, it is not necessary that the names of all the purchasers should be mentioned either at the time of the first or the second demand. Thus where a pre-emptor claimed the right of pre-emption against five purchasers, and the form used was "whereas Jagdeb Singh and others have purchased the property and I have claimed pre-emption," etc., and this was proclaimed in the presence of two of the purchasers and at the empty doors of the other three, it was held that the demand was properly made, and that there was nothing equivocal in the formulation of the claim (j).

(6) Explanation I.—See sec 182, Expl. II and notes thereto.

#### 186A. Transfer of property by purchaser after demands.—

When once a pre-emptor has made the "demands" required by law [s. 186], a transfer by the purchaser of the property sought to be pre-empted will not affect the rights of the pre-emptor, and the pre-emptor is not bound to make fresh "demands" against the transferee (k).

187. Tender of price not essential.—It is not necessary to the validity of a claim of pre-emption that the pre-emptor should tender the price at the time of the *talab-i-ishhad* [s. 186]; it is sufficient that he should then declare his readiness and willingness to pay the price stated in the deed of sale, or, if he has reasonable grounds to believe that the price named in the sale deed is fictitious, such sum as the Court determines to have been actually paid by the buyer (l).

(i) *Baillie*, 490; *Nathu v. Shadi* (1915) 37 All. 522, 29 I.O. 495; *Ruffub Ali v. Chunda Churn* (1890) 17 Cal. 543 [F.B.].

(j) *Jag Deb v. Mahomed* (1905) 32 Cal. 982.

(k) *Muhammad Abdul v. Muhammad* (1924) 46 All. 889, 79 I.O. 1058, ('24) A.A. 806.

(l) *Baillie*, 494; *Heera Lal v. Moorut Lal* (1869) 11 W.R. 275; *Lajja Prasad v. Deb Prasad* (1880) 3 All. 236, *Nundo Pershad v. Gopal* (1884) 10 Cal. 1008; *Kerim Baksh v. Khuda Baksh* (1894) 18 All. 247, 248. See *Jagat Singh v. Baldeo Prasad* (1921) 43 All. 137, 59 I.O. 679, ('21) A.A. 290 [sale to mortgage].

*Oudh Laws Act, 1876*.—Section 13 of this Act requires the Court to fix the fair market value if the price named in the sale deed is fictitious. But the price actually paid is treated as evidence of the market value (m).

*Punjab Pre-emption Act, 1913*.—Section 25 of this Act requires the Court to determine the market value if the price was not fixed in good faith or paid. But if the price named in the sale deed has been paid, that is the price for pre-emption unless there is clear proof of a refund by the vendee to the vendor (n).

**188. Death of pre-emptor.**—If the pre-emptor dies pending the suit for pre-emption, the suit may be continued by his legal representatives.

*A* sues *B* for pre-emption. *A* dies before obtaining a decree in the suit. According to the Hanafi law, the right to sue is extinguished and the suit cannot be prosecuted by *A*'s heirs (o). According to the Shia and the Shafei law, the right to sue is not extinguished, and the suit may be continued by *A*'s heirs: Bailie, II, 190; *Hedaya*, 561. According to the Probate and Administration Act, 1881, sec. 89 [now Indian Succession Act 39 of 1925, sec. 306], the right is not extinguished, and the suit may be continued by *A*'s legal representative, that is his executor or administrator. That Act applies to Mahomedans, and the effect of a Bombay decision is that whatever be the sect to which the parties belong, the rule applicable to cases of this kind is that laid down in the Act, that is to say, if *A* dies leaving a will, the suit may be continued by his executor, and if he dies intestate it may be continued by his heirs on obtaining letters of administration (p).

**189. Right lost by acquiescence.**—The right of pre-emption is lost if the pre-emptor enters into a compromise with the buyer, or if he otherwise acquiesces in the sale (q). But a mere offer by a pre-emptor to purchase from the buyer at the sale-price, made with the object of avoiding litigation, does not amount to acquiescence (r).

**189A. Right lost by joinder of plaintiffs not entitled to pre-empt.**—If a plaintiff who has a right of pre-emption joins with himself as co-plaintiff a person who has no such right he is not entitled to claim pre-emption, and the suit must be dismissed. But the right is not lost if he joins with himself as co-plaintiff a person who, but for his failure to make the necessary demands [sec. 186], would have been entitled to pre-empt (s).

(m) *Lalloo Singh v Jagjwan Prasad* (1886) 159 I O 609, ('86) A O 100

(n) *Ali Akbar v. Multan* (1936) 180 I.C. 452, ('36) A.P. 12

(o) *Bailie*, 505-506; *Muhammad Hussein v. Niamat-un-nissa* (1897) 20 All. 88.

(p) *Sayyad Jauil Hussain v. Sitarum* (1912) 36 Bom. 144, 12 I.C. 720 [Shafei]; *Sitarum v. Sayad Sirajul* (1917) 41 Bom. 656, 658, 42 I.C. 32, affd on app. to P.C. in *Sitarum v. Jauil Hussain* (1921) 45 Bom. 1056, 1061, 48 I.A. 475, 479, 64 I.C. 826, ('23) A. P.O.

41. See also Code of Civil Procedure, 1908, O. 22, r 1

(q) *Habib-un-nissa v. Barkat Ali* (1886) 8 All. 275; *Amir Haidar v. Ali Ahmad* (1925) 47 All. 635, 88 I.C. 234, ('25) A.A. 424 [minor].

(r) *Muhammad Naev-ud-din v. Abdul Hasan* (1894) 16 All. 300; *Muhammad Yunus v. Muhammad Yusuf* (1897) 19 All. 334

(s) *Dwarkan Singh v. Sheo Shankar* (1926) 48 All. 810, 98 I.C. 1007, ('27) A.A. 168; *Mahenah Tokh Narayan v. Ram Zachhaya* (1926) 5 Pat. 98, 90 I.C. 806, ('25) A.P. 743.

**Ss.** 190. Right not lost by refusal to buy before sale.—As the  
**190-191A** right of pre-emption accrues *after* the completion of sale, it is not lost because *before* the completion of sale the property was offered to the pre-emptor and he refused to buy (*t*) [sec. 186, Expl. I]. *A fortiori* it is not lost because he had previous notice of the sale and he made no offer to the seller to buy the property (*u*).

**190A.** Right not lost by previous notice of sale.—As the right of pre-emption arises *after* the completion of sale, it is not lost because the pre-emptor had notice that the property was for sale and he did not offer to purchase it (*v*) [sec. 186, Expl. I].

**191.** Sale to two or more persons.—Where the property is sold to two or more persons, the pre-emptor may pre-empt the share of any one of them (*w*) [sec. 186, Expl. IV].

The decision in the case cited proceeded on the ground that the Mahomedan jurists regard each vendee as if he had entered into a separate transaction. It is however contrary to a line of decisions in Lahore (*x*) to the effect that the pre-emptor must take over the bargain in its entirety.

**191A.** Suit for pre-emption: what the claim must include.—Where the property is sold to a single buyer, a person claiming to pre-empt must pre-empt the whole interest comprised in the transfer to the buyer. A suit which does not ask for pre-emption of the whole of such interest is defective, and should not be entertained (*y*).

The principle of denying the right of pre-emption except as to the whole of the property sold is that if the pre-emptor were allowed to split up the bargain, he would be at liberty to take the best portion of the property and leave the worst part of it with the vendee (*a*). "The right of pre-emption was never intended to confer such a capricious choice upon the pro-emptor" (*a*). But if the same sale deed embodies two transactions of sale, the pre-emptor may pre-empt the one and not the other (*b*). Again if the sale includes properties which are not subject to pre-emption, the pre-emptor is entitled to exclude them and to pre-empt the rest (*c*). Where the purchaser himself sells part of the property to another, the pre-emptor is entitled to pre-emption in respect of that portion which remains with the purchaser (*d*).

*Limitation.*—A suit to enforce the right of pre-emption must be instituted within one year from the date when the purchaser takes physical possession

- (t) *Abadi Begum v. Inam Begum* (1877) 1 All. 521; *Kanhai Lal v. Kalka Prasad* (1905) 27 All. 670.  
 (u) *Muhammad Askari v. Rahmatullah* (1927) 49 All. 716, 105 I.O. 771, ('27) A.A. 548.  
 (v) *Ibid.*  
 (w) *Ibid.*  
 (x) *Muhammad Shafi v. Allah Din* (1934) 153 I.C. 128, ('34) A.L. 429 and the cases there cited  
 (y) *Durga Prasad v. Munshi* (1884) 6 All. 423; *Dholi v. Khanum* (1925)

- 160 I.C. 576, ('35) A.L. 835.  
 (a) *Sheobhara v. Jach Rai* (1886) 8 All. 462  
 (a) *Durga Prasad v. Munshi* (1884) 6 All. 423, at p. 426  
 (b) *Abdul Karim v. Ghulam Nabi* (1934) 151 I.O. 367, ('34) A.L. 402.  
 (c) *Zainab Bibi v. Umar Hayat Khan* (1936) All.L.J. 456, 161 I.O. 753, ('36) A.A. 782.  
 (d) *Uda Ram v. Atma Ram* (1924) 5 Lah. 80, 80 I.O. 960, ('24) A.L. 431.

of the property, or, where the subject of the sale does not admit of physical possession, when the instrument of sale is registered [Limitation Act, 1908, sec. I, art. 10].<sup>9</sup> If the subject of sale does not admit of physical possession and there is no registered instrument the suit will be governed not by art. 10, but by art. 120 (e). If the sale has been disguised as a usufructuary mortgage in order to defeat the right of pre-emption, limitation runs from the time when the fraud is discovered (f). When the person entitled to pre-emption is a minor, the right may be claimed on his behalf by his guardian, but the suit must be instituted within the aforesaid period, and the period of limitation will not be extended by reason of the pre-emptor's minority [Limitation Act, 1908, sec. 8].

*When pre-empted property vests in pre-emptor*—See Code of Civil Procedure, 1908, O. 20, r. 14. Upon a pre-emption decree, the property and the right to mesne profits vest in the pre-emptor from the date when he pays the amount of the purchase price finally decreed, until that time, the original purchaser retains possession and is entitled to the rents and profits (g).

*Decree in a suit for pre-emption*.—See Code of Civil Procedure, O. 20, r. 14.

*Property subject to mortgage*.—If the property of which possession is decreed is subject to a mortgage, the pre-emptor takes it subject to the mortgage (h). If the property is in the possession of the mortgagee, the decree should provide that his possession should not be disturbed until redemption of the mortgage (i).

**191B. Decree for pre-emption not transferable.**—A decree for pre-emption is not transferable so as to entitle the transferee to obtain possession of the property in suit in execution of the decree (j).

**192. Legal device for evading pre-emption.**—When it is apprehended that a claim for pre-emption may be advanced by a neighbour, the vendor may sell the whole of his property excluding a portion, however small, immediately bordering on the neighbour's property, and thus defeat the neighbour's right of pre-emption.

*Hedaya*, 563; *Baillie*, 512 *et seq.* Fabrication is not one of the devices permissible under the Mahomedan law for defeating the right of pre-emption (k). See notes to sec. 182, "Lease in perpetuity."

**193. Sect-law as governing pre-emption.**—(1) If both the vendor and pre-emptor are Sunnis, the right of pre-emption is to be determined according to the Sunni law, and if both the parties are Shias (l), the right of pre-emption is governed by the Shia law (m).

- (e) *Batul Begum v. Mansur Ali* (1902) 24 All. 17; *Kaunilla v. Gopal* (1906) All. W. N. 73  
(f) *Bhagwana v. Shadi* (1934) 16 Lah. 408, 155 I. O. 654, ('34) A. L. 878.  
(g) *Deokinandan v. Sri Ram* (1889) 12 All. 234 F.B.; *Deonandan Prasad v. Ramdhari* (1917) 44 Cal. 675, 44 I. A. 80, 39 I. O. 958.  
(h) *Tejpal v. Girdhari Lal* (1908) 30 All. 130.  
(i) *Shameuddin v. Allauddin* (1931) All. L.J. 1938, 184 I. O. 462, ('32) A.

- A. 138.  
(j) *Ram Sahai v. Gaya* (1884) 7 All. 107, 111; *Nadir Ali v. Wah* (1924) 5 Lah. 486, 85 I. O. 182, ('25) A. L. 202; *Mehr Khan v. Ghulam* (1921) 2 Lah. 282, 64 I. O. 191, ('22) A. L. 300.  
(k) *Jadu Lal v. Janki Koor* (1908) 85 Cal. 575, s.m.m. In (1912) 39 Cal. 915, 39 I. A. 101, 15 I. O. 69.  
(l) See *Gobind Dayal v. Inayatullah* (1885) 7 All. 775.  
(m) *Abbas Ali v. Maya Ram* (1888) 12 All. 229.

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**Ss.** (2) If the vendor is a Sunni, and the pre-emptor is a Shia, the right of pre-emption is, according to the Allahabad High Court, governed by the Shia law, on the principle of reciprocity explained in the notes to sec. 184 above (n).

(3) If the vendor is a Shia, and the pre-emptor is a Sunni, then according to the Allahabad High Court, the right of pre-emption is governed by the Shia law (o); but according to the Calcutta High Court, it is governed by the Sunni law (p).

(4) The personal law of the buyer is immaterial in these cases (q).

**193A. Points of difference between Sunni and Shia law of pre-emption.**—(1) According to the Shia law, no right of pre-emption exists in the case of property owned by *more than two* co-sharers (r).

(2) The Shia law does not recognize the right of pre-emption on the ground of *vicinage* (s), or on the ground of "participation in the appendages."

Baillie, II, 175-179. *A*, a Sunni, sells his land to *B*. *A*'s neighbour *C*, who is a Shia, sues *A* and *B* for pre-emption. According to the Allahabad High Court, the law to be applied is the Shia law, and under that law a neighbour as such has no right of pre-emption. *C* is not therefore entitled to pre-empt. But if we deny *C* the right to pre-empt by applying his own law [Shia law] to him it is but fair when *C* sells his own property, we should apply the same law, so that if his neighbour is a Sunni and he claims the right of pre-emption on the ground of *vicinage*, we should not allow his Sunni neighbour the right of pre-emption. This is the line of reasoning followed by the Allahabad High Court in the cases referred to in sec. 193, sub-secs. (2) and (3). The tendency of the Calcutta High Court is to apply in all cases the Sunni law of pre-emption except perhaps in cases where both the vendor and pre-emptor are Shias. The reason given by that Court is that the law of pre-emption is in force in this country is the Sunni law of pre-emption.

(n) *Qurban v Chote* (1899) 22 All 102

(o) *Pir Khan v Fayez* (1914) 36 All.

488, 25 I C 445.

(p) *Jog Deb v Mahomed* (1905) 32 Cal

982

(q) *Gobind Dayal v Inayatullah* (1885)

7 All 775, *Jog Deb v Mahomed*

(1905) 32 Cal 982 But see

*Kudratulla v Mahini Mohan* (1869)

4 B L R 154

(r) *Abbas Ali v. Maysa Ram* (1888) 13

All. 229; *Hussain Baksh v. Mafuz-*

*ul-haq* (1925) 47 All 944, 86 I C

972, (25) A. A. 559.

(s) *Qurban v Chote* (1899) 22 All 102.

## CHAPTER XIV.

### MARRIAGE, MAINTENANCE OF WIVES AND RESTITUTION OF CONJUGAL RIGHTS.

#### A.—MARRIAGE.

**194. Definition of marriage.**—Marriage (*mihak*) is defined Ch. XIV.  
to be a contract which has for its object the procreation and ss.  
the legalizing of children. 194, 195

*Hedaya*, 25; *Baillie*, 4.

**Contract.**—Marriage according to the Mahomedan law is not a sacrament but a civil contract. All the rights and obligations it creates arise immediately and are not dependent on any condition precedent such as the payment of dower by a husband to a wife (a).

**Zina**—*Zina* means fornication or adultery. Sexual intercourse not permitted by the Mahomedan law is *zina*. The offspring of such intercourse is illegitimate, and cannot be legitimated by acknowledgment [s. 249 (2)].

**195. Capacity for marriage.**—(1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.

(2) Lunatics and minors who have not attained puberty may be validly contracted in marriage by their respective guardians [ss. 207-211].

(3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

The same rule applies in the case of a Shafei girl who has attained puberty (b).

**Explanation.**—Puberty is *presumed*, in the absence of evidence, on completion of the age of fifteen years.

*Hedaya*, 529; *Baillie*, 4. Note that the provisions of the Indian Majority Act, 1875, do not apply to matters relating to *marriage*, *dower*, and *divorce*. See notes to sec. 101 above.

With reference to a girl the Judicial Committee observed that the age of puberty in Mahomedan law is nine years (c). Their Lordships were no doubt

(a) *Abdul Kadir v. Salima* (1886) 8 All. 149.

(b) *Hassan Kuttis v. Jinnabha* (1929) 53 Mad. 89, 113 I.O. 306. ('28) A.M. 1255; *Sayad Mohiuddin v. Khattajabas* (1930) 41 Bom. L. R.

1020, 185 I.O. 390, ('39) A.B. 489.

(c) *Sadiq Ali Khan v. Jav Kuthori* (1928) 30 Bom. L. R. 1348, 109 I.O. 387, ('28) A.P.C. 152.



**Ss. 195-196A** referring to the passage in the Hedaya that "the earliest period of puberty with respect to a boy is twelve years, and with respect to a girl nine years."

*Consent to marriage obtained by force or fraud.*—Where consent to a marriage has been obtained by force or fraud, the marriage is invalid unless it is ratified (*d*) Where consent to the marriage has not been obtained, consummation against the will of the woman will not validate the marriage (*e*).

**196. Essentials of a marriage.**—It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential (*f*).

For a description of the regular procedure for obtaining the consent of the girl and the usual form in which the proposal and acceptance is gone through where women are in purdah see the undermentioned case (*g*) But it was held by the Oudh Chief Court that the proposal and acceptance need not be in any particular form. In this case there was evidence of the consent of the girl and that the husband had agreed to the dower and it was held that under the circumstances after the lapse of a long time after the marriage all the formalities required should be presumed to have been complied with (*h*).

*Hedaya*, 25, 26; Baillie, 4, 5, 10, 14. The usual form of proposal is, "I have married myself to you," and that of acceptance is, "I have consented."

*Registration of marriages.*—As to registration of Mahomedan marriages, see the Kazi's Act, 1880, and Bengal Act I of 1876 read with Act VII of 1905.

**Shia law.**—According to the Shia law the presence of witnesses is not necessary in any matter regarding marriage: Baillie, II, 4.

**196A. Valid, irregular, and void marriages.**—A marriage may be valid (*sahih*), or irregular (*fāsid*), or void from the beginning (*bātil*).

*Irregular or invalid marriages.*—The term "fasid" is translated in Baillie's Digest as "invalid," but as the word "invalid" in the English language also means "void," "irregular" has been substituted for "invalid" in conformity with the usage of modern writers on the subject As to irregular marriages, see secs 197 to 200 and sec. 204 As to void marriages, see secs. 201 to 203.

- (*d*) *Abdul Latif v Nyaz Ahmed* (1909) 31 All 343, 1 I.O. 538 [wife's illness concealed], *Kulsumbi v Abdul Kadir* (1921) 45 Bom 151, 39 I.O. 439, ('21) A.B. 205 [pregnancy concealed].
- (*e*) *Mt Ahmad-un-nisa Begum v. Ali Akbar Shah* (1942) 199 I.O. 531, ('42) A. Pesh 19, *Jogu Bibi v Messal Shaukh* (1938) 63 Cal. 415 relied on: *Abdul Kasem v. Jamila Khatun Bibi* (1940) 1 Cal. 401, 44 C.W.N. 352, 188 I.O. 490, ('40)

- A.C. 251
- (*f*) *Maung Ky v Ma Shwe Baw* (1929) 7 Rang. 777, 121 I.O. 718, ('29) A.R. 341, *Jogu Bibi v. Messal Shaukh* (1938) 63 Cal. 415, 164 I.O. 957.
- (*g*) *Mt. Ghulam Kubra Bibi v Mohammad Shafi* ('40) A. Pesh. 3.
- (*h*) *Mt Bashiran v. Mohammad Hussain* (1941) 16 Luck. 615, (1941) O.W.N. 249, 193 I.O. 161, ('41) A.O. 284.

**197. Absence of witnesses.**—A marriage contracted without witnesses as required by sec. 196 is irregular, but not void. **Ch. XIV, Ss. 197-199**

Baillie, 155. As to irregular marriages, see secs. 204A and 206 below.

**198. Number of wives.**—A Mahomedan may have as many as four wives at the same time, but not more. If he marries a fifth wife when he has already four, the marriage is not void, but merely irregular.

Baillie, 30, 154 (fourth class); Ameer Ali, 5th ed., vol. ii, p. 280. As to irregular marriages, see secs. 204A and 206.

**198A. Plurality of husbands.**—It is not lawful for a Mahomedan woman to have more than one husband at the same time. A marriage with a woman, who has her husband alive and who has not been divorced by him, is void (i).

A Mahomedan woman marrying again in the lifetime of her husband is liable to be punished under sec. 494 of the Indian Penal Code (j). The offspring of such a marriage is illegitimate (k), and cannot be legitimated by acknowledgment (l) [s. 249 (2)].

**199. Marriage with a woman undergoing iddat.**—(1) A marriage with a woman before completion of her *iddat* is irregular, not void. The Lahore High Court at one time treated such marriages as void (m); but in a later decision held that such a marriage is irregular and the children legitimate (n).

(2) *Iddat*.—"Iddat" may be described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death to remain in seclusion, and to abstain from marrying another husband. The abstinence is imposed to ascertain whether she is pregnant by the husband, so as to avoid confusion of the parentage. When the marriage is dissolved by *divorce*, the duration of the *iddat*, if the woman is subject to menstruation, is three courses; if she is not so subject, it is three lunar months. If the woman is pregnant at the time, the period terminates

(i) *Liaqat Ali v. Karam-un-nissa* (1893) 15 All. 399, 398; *Habibur Rahman v. Altaf Ali* (1921) 43 I.A. 114, 121, 48 Cal. 386, 60 I.O. 887; *Budanea v. Fatma Bi* (1914) 26 Mad L.J. 260, 22 I.O. 697. In the matter of *Ram Kumari* (1891) 18 Cal. 264, 269; *Nandi v. The Crown* (1920) 1 Lah. 440, 59 I.O. 38; *Government of Bombay v. Ganaga* (1890) 4 Bom. 380.

(j) In the matter of *Ram Kumari* (1891) 18 Cal. 264; *Nandi v. The Crown* (1920) 1 Lah. 440; *Hamad v. Emperor* ('81) A.L. 194, 134 I.O.

(k) *Bi* (1914) 26 Mad L.J. 260, 25 I.O. 697.

(l) (1893) 15 All. 896, *supra*.  
(m) *Jhandu v. Mat. Husain Bibi* (1923) 4 Lah. 192, 73 I.O. 590, ('23) A.L. 949; *Mt. Karo v. Bagh Singh* (1935) 157 I.O. 779, ('35) A.L. 23.

(n) *Muhammad Hayat v. Muhammad Nawas* (1935) 17 Lah. 48, 156 I.O. 40, ('35) A.L. 622.

**Ss. 199, 199A.** upon delivery. When the marriage is dissolved by *death*, the duration of the *iddat* is four months and ten days. If the woman is pregnant at the time, the *iddat* lasts for four months and ten days *or* until delivery, whichever period is longer (*o*).

If the marriage is dissolved by *death*, the wife is bound to observe the *iddat* whether the marriage was consummated or not. If the marriage was dissolved by *divorce*, she is bound to observe the *iddat* only if the marriage was consummated; if there was no consummation, there is no *iddat*, and she is free to marry immediately.

The *iddat* of divorce commences from the date of the divorce and that of death from the date of death. If information of divorce or of death does not reach the wife until after the expiration of the period of *iddat*, she is not bound to observe any *iddat* [Baillie, 357].

*Hedaya*, 128-129; Baillie, 38, 151, 352-358. As to *iddat* in the case of an irregular marriage, see sec. 206 (2) (ii).

*Marriage during iddat.*—*H* has four wives, *A*, *B*, *C*, and *D*. He divorces *A* after consummation of the marriage with her. It is not permissible to *A* to marry another husband, nor to *H* to marry another wife, during *A*'s *iddat*. Nor is it permissible to *H*, if one of the other wives dies during *A*'s *iddat*, to marry *A*'s sister (s. 204). But either party may marry again after completion of *A*'s *iddat*, and *H* may, if he so chooses, marry *A*'s sister. The primary object of *iddat* is to impose a restraint on the marriage of the wife, but this involves a corresponding restraint on the marriage also of the husband to the extent mentioned above. It must, however, be remembered that a marriage before completion of the *iddat* is not void, but merely irregular. As to irregular marriages, see secs 204A and 206.

*Valid retirement.*—When the husband and wife are alone together under circumstances which present no legal, moral or physical impediment to marital intercourse, they are said to be in "valid retirement" (*khuluat-us-sahih*). A valid retirement in the Sunni law has the same legal effect as actual consummation as regards dower, [ss. 206, 243 (2)], the establishment of paternity, the observance of *iddat* (s. 199), wife's maintenance during *iddat* (s. 215), the bar of marriage with wife's sister (s. 204), and the bar of marriage imposed by the rule in sec. 198. But it has not the same effect as actual consummation as regards the bar of marriage with the wife's daughter (s. 202), or the bar of remarriage between divorcees [s 243 (4)] In both these cases there must have been actual consummation as stated in secs 202 and 243 (5): Baillie, 98-101

**199A. Marriage between a Sunni and Shia.**—A Sunni male may contract a valid marriage with a Shia female (*p*), and a Shia male may contract a valid marriage with a Sunni female (*q*).

(o) 4 Lah 192, *supra*  
(p) *Syud Ghulam Hossain v. Musst. Sela-*  
*hah Broom* (1966) 6 W. R. 48;  
*Aziz Bano v. Muhammad* (1925) 47

All 823, 89 I.O 690, ('25) A.A. 720.  
(q) *Nasrat Hussain v. Hamidan* (1882)  
4 All 205.

The rights and obligations of the wife would be governed by the law to which she belonged at the time of her marriage. Sec sec 23

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Ss.  
199-201

**200. Difference of religion.**—(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage, however, with an idolatress or a fire-worshipper, is not void, but merely irregular (*r*).

(2) A Mahomedan woman cannot contract a valid marriage except with a Mahomedan. She cannot contract a valid marriage even with a *Kitabi*, that is, a Christian or a Jew. A marriage, however, with a non-Muslim, whether he is a *Kitabi*, that is, a Christian or a Jew, or a non-*Kitabi*, that is, an idolator or a fire-worshipper, is irregular, not void.

*Hedaya*, 30; *Bailhe*, 40-42, 151, 153

As to irregular marriages, see secs. 204A and 206.

*Kitabi*.—*Kitab* means a book, that is, a book of revealed religion. *Kitabi* means a male who believes in Christianity or Judaism. *Kitabia* is a female who believes in either of these religions. The question whether a Buddhist woman can be regarded as a *Kitabia* arose in a case before the Privy Council, but it was not decided (*s*).

*Indian Christian Marriage Act*, 1872.—In British India, a marriage between a Mahomedan male and a Christian woman must be solemnized in accordance with the provisions of sec. 5 (4) of the Indian Christian Marriage Act, 1872 (XV of 1872), that is to say, by, or in the presence of, a Marriage Registrar appointed under the Act; any such marriage solemnized otherwise than in accordance with those provisions "shall be void." But since a Mahomedan woman cannot contract a valid marriage with a Christian man, such a marriage, it would appear, cannot be solemnized under that Act: see sec 88 of the Act.

**Shia law.**—In the Shia law, a marriage between a Muslim male and a non-Muslim female is unlawful and void; and so also is a marriage between a Muslim male and a non-Muslim female. But a Muslim male may contract a valid *muta* marriage (*s*. 206B) with a *Kitabia*. The Shias reckon fire-worshippers among *Kitabias*: *Baillie*, 29, 40

**201. Prohibition on the ground of consanguinity.**—A man is prohibited from marrying (1) his mother or his grandmother how high soever; (2) his daughter or grand-daughter how low soever; (3) his sister whether full, consanguine or uterine; (4) his niece or great niece how low soever; and (5) his aunt or great aunt how high soever, whether paternal or maternal. A marriage with a woman prohibited by reason of consanguinity is void.

(*r*) *Ihsan v. Panna Lal* (1928) 7 Pat 6, 108 I.C. 480, ('28) A.P. 19.  
(*s*) *Abdool Rozack v. Aga Mahomed Jaffer*

(1898) 21 I.A. 56, 64-65, 21 Cal 666, 674.

**Ss.** *Hedaya*, 27; Baillie, 24. As to void marriages, see secs. 204A and 205A  
 201-204 below

**202. Prohibition on the ground of affinity.**—A man is prohibited from marrying (1) his wife's mother or grandmother how high soever; (2) his wife's daughter or grand-daughter how low soever; (3) the wife of his father or paternal grandfather how high soever; and (4) the wife of his son, or of his son's son or daughter's son how low soever. A marriage with a woman prohibited by reason of affinity is void.

In case (2), marriage with the wife's daughter or grand-daughter is prohibited only if the marriage with the wife was consummated.

*Hedaya*, 28; Baillie, 24-29, 154. As to void marriage, see secs. 204A and 205A below.

**203. Prohibition on the ground of fosterage.**—Whoever is prohibited by consanguinity or affinity is prohibited by reason of fosterage except certain foster relations, such as sister's foster-mother, or foster-sister's mother, or foster-son's sister, or foster-brother's sister, with any of whom a valid marriage may be contracted. A marriage prohibited by reason of fosterage is void.

*Hedaya*, 68, 69; Baillie, 30, 154, 194, 195. As to void marriages, see secs. 204A and 205A below.

**204. Unlawful conjunction.**—A man may not have *at the same time* two wives who are so related to each other by consanguinity, affinity or fosterage, that if either of them had been a male, they could not have lawfully intermarried, as, for instance, two sisters, or aunt and niece. The bar of unlawful conjunction renders a marriage irregular, not void.

*Hedaya*, 28, 29; Baillie, 31, 153.

*Wife's sister.*—A man may not, as already stated, marry his wife's sister in his wife's lifetime. According to the Calcutta High Court (t) such a marriage is void, and the issue is illegitimate (s. 205A). According to the High Courts of Bombay (u) and Madras (v) and the Chief Court of Oudh (w) such a marriage is merely irregular, and the issue is not illegitimate (s. 206). The Calcutta decision, it is submitted, is not correct.

There is, of course, nothing to prevent a man from marrying his wife's sister *after* the death or divorce of the wife: Baillie, 33.

(t) *Azunnissa v. Karimunissa* (1895) 23 Cal. 130.

(u) *Tajbi v. Mowla Khan* (1917) 41 Bom. 436, 89 I.C. 608.

(v) *Rahman Biba v. Mahboob Biba* (1938) Mad. 278, (1937) 2 M.L.J. 753,

176 I.C. 300, ('88) A.M. 141.  
 (w) *Musammât Kanwa v. Hasan* (1926) 1 Luck. 71, 92 I.C. 82, ('28) A.O. 231, *Totamand v. Muhammad* (1931) 12 Lah. 52, 129 I.C. 12, ('30) A.L. 907.

Shia law.—In Shia law a man may marry his wife's aunt, but he cannot marry his wife's niece without the permission of the wife (that is, aunt):  
 Baillie, II, 23.

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 Ss.  
 204, 204A

**204A. Distinction between void and irregular marriages.—**

(1) A marriage which is not valid may be either void or irregular.

(2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus a marriage with a woman prohibited by reason of consanguinity (s. 201), affinity (s. 202), or fosterage (s. 203), is void, the prohibition against marriage with such a woman being perpetual and absolute (x).

(3) An irregular marriage is one which is not unlawful in itself, but unlawful "for something else," as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely—

- (a) a marriage contracted without witnesses (s. 197);
- (b) a marriage with a fifth wife by a person having four wives (s. 198);
- (c) a marriage with a woman undergoing *iddat* (s. 199);
- (d) a marriage prohibited by reason of difference of religion (s. 200);
- (e) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 204).

The reason why the aforesaid marriages are irregular, and not void, is that in cl. (a) the irregularity arises from an accidental circumstance; in cl. (b) the objection may be removed by the man divorcing one of his four wives; in cl. (c) the impediment ceases on the expiration of the period of *iddat*; in cl. (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith; and in cl. (e) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself.

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(x) Women within the prohibited degree are called *Moharim*.

**Ss.**  
**204A-206**

Baillie, 150-155.

**Shia law.**—The Shia law does not recognize the distinction between irregular and void marriages. According to that law a marriage is either valid or void. Marriages that are irregular under the Sunni law are void under the Shia law.

**205. Effects of a valid (sahib) marriage.**—A valid marriage confers upon the wife the right of dower, maintenance and residence in her husband's house, imposes on her the obligation to be faithful and obedient to him, to admit him to sexual intercourse, and to observe the *iddat*. It creates between the parties prohibited degrees of relation and reciprocal rights of inheritance.

Baillie, 13. It may be noted that a Mahomedan husband does not by marriage acquire any interest in his wife's property (y).

**205A. Effects of a void (batil) marriage.**—A void marriage is no marriage at all. It does not create any civil rights or obligations between the parties. The offspring of a void marriage are illegitimate.

Baillie, 156. The marriages referred to in secs 198A, and 201 to 203 are void

**206. Effects of an irregular (fasid) marriage.**—(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you." (2) An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place—

- (i) the wife is entitled to dower, proper or specified, whichever is less (ss. 218, 220);
- (ii) she is bound to observe the *iddat*, but the duration of the *iddat* both on divorce and death is three courses [see s. 199 (2)];
- (iii) the issue of the marriage is legitimate (a). But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife [Baillie, 694, 710]. The Chief Court of Oudh has held that it does create such

(y) *A v B* (1896) 21 Bom. 77, 84.  
(z) *Mt. Bakā Bibi v. Quam Dun* ('84)  
A.L. 907, 154 I.C. 677  
(a) *Mt. Bakā Bibi v. Quam Dun* ('84)  
A.L. 907, 154 I.C. 677; *Muham-*

*mad Hayat v. Muhammad Nawaz*  
(1935) 17 Lah. 48, 156 I.C. 40,  
(85) A.L. 622; *Rahman Bibi v. Mahboob Bibi* (1938) Mad. 278,  
(88) A.M. 141.

rights (b), but the decision, it is submitted, is not **Ch. XIV,**  
correct. **Ss.**

206, 206A

Baillie, 156-158, 694. See secs. 197-200, 204 and 204A

**206A. Presumption of marriage.**—Marriage will be presumed, in the absence of direct proof, from—

- (a) prolonged and continual cohabitation as husband and wife (c); or,
- (b) the fact of the acknowledgment by the man of the paternity of the child born to the woman, provided all the conditions of a valid acknowledgment mentioned in sec. 249 below are fulfilled (d); or,
- (c) the fact of the acknowledgment by the man of the woman as his wife (e).

The presumption does not apply if the conduct of the parties was inconsistent with the relation of husband and wife (f), nor does it apply if the woman was admittedly a prostitute before she was brought to the man's house (g). The mere fact, however, that the woman did not live behind the purda, as the admitted wives of the man did, is not sufficient to rebut the presumption (h).

In *Abdool Razack v. Aga Mahomed* (i), their Lordships of the Privy Council said: "In the next place, it was urged that every presumption ought to be made in favour of marriage when there had been a lengthened cohabitation, especially in a case where the alleged marriage took place so long ago that it must

(b) *Mohammad Shafi v. Raunag Ali* ('28) A.O. 231, 107 I.O. 882

(c) *Khajah Hidayat v. Rai Jan* (1844) 3 M.L.A. 295, 317-318, 323 [marriage presumed], *Mahomed Banker v. Shurfoon-Nusa* (1860) 8 M.L.A. 136, 159 [marriage not presumed]; *Ashrood Doulat v. Hyder Hoseine* (1866) 11 M.L.A. 94, 115 [marriage not presumed]; *Jarut-ool-Butool v. Hoseine Begum* (1867) 11 M.L.A. 194, 209-210 [marriage not presumed]; *Mauing Eys v. Ma Shwe Baw* (1929) 7 Rang. 777, 121 I.O. 718, ('29) A.R. 341 [marriage presumed]; *Masit-un-Nusa v. Pathani* (1904) 28 All. 295 [marriage not presumed]; *Abdul Hakim v. Saadat Ali* ('29) A.O. 126, 112 I.O. 596 [marriage presumed]; *Haseen Ali Mirja v. Nasratali Mirja* (1935) 62 Cal.L.J. 428, 157 I.O. 1091, ('35) A.O. 572 [extension of muta marriage presumed]; *Ma Khatoon v. Ma Mya* (1936) 165 I.O. 232, ('36) A.R. 448

(d) *Imambandi v. Mutsaddi* (1918) 45 I.A. 78, 81-82, 45 Cal. 878, 889-890, 47 I.C. 513; *Habibur Rahman v. Aluf Ali* (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.O. 837,

('22) A.P.C. 159

(e) *Mt. Bashuran v. Mohammad Hussein* (1941) 16 Luck. 615, (1941) O.W.N. 249, 193 I.O. 161, ('41) A.O. 284

(f) *Abdool Razack v. Aga Mahomed* (1933) 21 I.A. 56, 65, 21 Cal. 666, 674, *Fateh Mohammad v. Abdul Rahman* (1931) 12 Lah. 396, 134 I.O. 590, ('31) A.L. 223 [where the man had refused to acknowledge the woman as his wife and her child as his child].

(g) *Ghazanfar v. Kaniz Fatima* (1910) 37 I.A. 105, 109, 32 All. 346, 350, 6 I.C. 674; *Jarut-ool-Butool v. Hoseine Begum* (1870) 11 M.L.A. 194. In *Ishad Ali v. Musammat Kariman* (1918) 20 Bom.L.R. 790, 46 I.O. 217, ('17) A.P.C. 169, the woman was a prostitute, but there was a writing evidencing the marriage, and the marriage was held proved.

(h) *Mohabbat Ali v. Mahomed Ibrahim* (1929) 56 I.A. 201, 209, 10 Lah. 725, 117 I.C. 17, ('29) A.P.C. 135.

(i) (1893) 21 I.A. 56, 65, 21 Cal. 666, 674



**Ss. 206A, 206B**, be difficult if not impossible to obtain a trustworthy account of what really occurred. There would be much force in this argument—indeed, it would be almost irresistible—if the conduct of the parties were shown to be compatible with the existence of the relation of husband and wife.” It was held in that case that the conduct of the parties was incompatible with that relation, and their Lordships held that the presumption did not apply.

In *Ghazunfa v. Kawa Fatima* (j), their Lordships of the Privy Council said: “The learned judges fully recognized that prolonged cohabitation might give rise to a presumption of marriage, but that presumption is not necessarily a strong one, and their Lordships agree that it does not apply in the present case, for the mother before she was brought to the father’s house was, according to the case on both sides, a prostitute.”

**206B. Muta marriage.**—(1) The Shia law recognizes two kinds of marriage, namely, (1) permanent, and (2) *muta* or temporary.

(2) A Shia of the male sex may contract a *muta* marriage with a woman professing the Mahomedan, Christian or Jewish religion, or even with a woman who is a fire-worshipper, but not with a woman following any other religion. But a Shia woman may not contract a *muta* marriage with a non-Moslem (k).

(3) It is essential to the validity of a *muta* marriage that (1) the period of cohabitation should be fixed, and this may be a day, a month, a year or a term of years (l), and that (2) some dower should be specified (m). When the term and the dower have been fixed, the contract is valid. If the term is fixed, but the dower is not specified, the contract is void. But if the dower is specified, and the term is not fixed, the contract, though void as a *muta*, may operate as a “permanent” marriage (n).

(4) The following are the incidents of a *muta* marriage:—

- (a) a *muta* marriage does not create mutual rights of inheritance between the man and the woman, but children conceived while it exists are legitimate and capable of inheriting from both parents (o);
- (b) where the cohabitation of a man and a woman commences in a *muta* marriage, but there is no evidence as to the term for which the marriage was contracted and the cohabitation continues, the proper inference would, in default of evidence to

(g) (1910) 37 I A 105, 109, 32 All 341.

(h) 359, 6 I.C. 674.

(k) Baillie, II, 29, 40.

(l) Baillie, II, 42.

(m) Baillie, II, 41.

(n) Baillie, II, 42-43; Querry, Vol. I, pp. 639, 693.

(o) Baillie, II, 44; *Shoharat Singh v. Jafri Bibi* (1915) 17 Bom.L.R. 13, 24 I.C. 499 [P.C.].

- the contrary, be that the *muta* continued during the whole period of cohabitation, and that children conceived during that period were legitimate and capable of inheriting from their father (*p*);
- (bb) even if there is evidence of the term for which the *muta* marriage was fixed and cohabitation continues after the expiry of that term, the inference is that the term was extended for the whole period of the cohabitation and that the children conceived during the extended term are legitimate (*q*);
- (c) a *muta* marriage is dissolved *ipso facto* by the expiry of the term. No right of divorce is recognized in the case of a *muta* marriage, but the husband may at his will put an end to the contract of marriage by "making a gift of the term" (*hiba-i-mud-dat*) to the wife, even before the expiration of the fixed term (*r*);
- (d) if a *muta* marriage is not consummated, the woman is entitled to half the dower. If the marriage is consummated, she is entitled to full dower, even though the husband may put an end to the contract by giving away the unexpired portion of the term. If the woman leaves her husband before the expiry of the term, the husband is entitled to deduct a proportionate part of the dower (*s*);
- (e) a woman married in the *muta* form is not entitled to maintenance under the Shia law (*t*). But it has been held that she is entitled to maintenance as a wife under the provisions of sec. 488 of the Criminal Procedure Code (*u*).

The Sunni law does not recognize *muta* marriages at all: Baillie, 18

The expression "permanent" in sub-sec. (1) is used in contradistinction to "temporary." No Mahomedan marriage, either among Sunnis or Shias, is permanent in the sense in which a Christian or a Parsi marriage is, for the husband may divorce the wife at any time he likes.

- (p) (1915) 17 Bom. L. R. 13, 24 I. C. 499, *supra* [the cohabitation in this case was for 10 years].
- (q) *Hassan Ali Mirza v. Nushratul Mirza* (1935) 62 Cal. L. J. 428, 157 I. C. 1091, ('35) A. O. 572, *Mt. Sarwar Ara Begum v. Nawab Bahadur Ali Khan* (1935) 10 Luck. 577, 158 I. C. 803, ('35) A. O. 152.
- (r) Baillie, II, 48; *Mohomed Abid Ali v. Ludden* (1887) 14 Cal. 276.
- (s) Baillie, II, 41; (1887) 14 Cal. 276, 284-285, *supra*.
- (t) Baillie, II, 97.
- (u) *Ludden v. Mirza Kamar* (1882) 8 Cal. 736. This decision is of doubtful authority because, as stated in *Shariya-ul-Islam*, "the name of a wife does not in reality apply to a woman contracted in *Moota*": Baillie, II, 244.

Ss.  
207, 208

### Marriage of Minors.

**207. Marriage of minors.**—A boy or a girl who has not attained puberty (in this Part called a minor), is not competent to enter into a contract of marriage, but he or she may be contracted in marriage by his or her guardian.

A boy or a girl who has attained puberty is at liberty to marry anyone he or she likes, and the guardian has no right to interfere if the match be equal: Macnaghten, p. 58, secs. 14-16. See sec. 195 above.

If the bride is a minor she cannot appoint an agent or wakil to enter into the contract of marriage on her behalf (v). The consent must be given by her legal guardian (w). See. 208

**208. Guardianship in marriage (jabr).**—The right to contract a minor in marriage belongs successively to the (1) father, (2) paternal grandfather how high soever, and (3) brother and other male relations on the father's side in the order of inheritance enumerated in the Table of Residuaries. In default of paternal relations, the right devolves upon the mother, maternal uncle or aunt and other maternal relations within the prohibited degrees. In default of maternal kindred, it devolves upon the ruling authority.

*Hedaya*, 36, 39\*. The fact that a guardian has been appointed by the Court of the person of a minor does not take away the power of the guardian for the marriage to dispose of the minor in marriage. But the minor being in such a case award of the Court, the guardian for the marriage should not dispose of the minor in marriage without the sanction of the Court to the proposed marriage (x).

*Apostasy of guardian for marriage.*—It is doubtful whether the right to dispose of a minor in marriage is lost by the apostasy of the guardian from the Mahomedan faith. Under the Mahomedan law an apostate has no right to contract a minor in marriage: *Hedaya*, 392. It is enacted, however, by Act XXI of 1850, that no law or usage shall inflict on any person who renounces his religion any "forfeiture of rights or property," and it was accordingly held by the High Court of Bengal in *Muchoo v. Arzoan* (y) that a Hindu father is not deprived of his right to the custody of his children and to direct their education by reason of his conversion to Christianity. In a subsequent case, however, decided by the same High Court, but without any reference to *Muchoo's* case, it was held that a Mahomedan, who had become a convert to Judaism, was disqualified by reason of his apostasy from disposing of his daughter in marriage (z). *Muchoo's* case was followed by the Chief Court of the Punjab (a), which was a case of a conversion of a Mahomedan father to Christianity. In a Bombay case, it was held, following *Muchoo's* case, that a Hindu convert to Mahomedanism is not disqualified from giving his son in adoption to a Hindu (b).

(v) *Shafi Ullah v. Emperor* (1934) All. L.J. 387, 150 I.C. 139, ('24) A.A. 589

(w) *Jogu Bibi v. Meesil Shauk* (1936) 63 Cal.L.J. 415, 164 I.O. 957.

(r) *Monjan v. District Judge, Burbhun* (1914) 42 Cal. 351, 25 I.C. 229

(y) (1866) 5 W.R. 235.

(z) *In the matter of Mahin Bibi* (1874) 18 B.L.R. 160.

(a) *Gul Muhammad v. Mussammat Wazir* (1901) 36 Punj. Rec. 191

(b) *Shameing v. Santabai* (1901) 25 Bom. 551.

It is submitted that the power to contract a minor in marriage is a "right" within the meaning of the above Act, and that the decision in *Muchoo's* case is correct. But the Court may in its discretion deal with each case on its own merits.

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**Shia law.**—The only guardians for marriage recognized by the Shia law are the father and the paternal grandfather how high soever: Baillie, II, 6. See notes to sec. 210.

### 209. Marriage brought about by father or grandfather.—

When a minor has been contracted in marriage by the father or father's father, the contract of marriage is valid and binding, and it cannot be annulled by the minor on attaining puberty. But where a father or father's father has acted fraudulently or negligently, as where the minor is married to a lunatic, or the contract is to the manifest disadvantage of the minor, the contract is voidable at the option of the minor on attaining puberty (c).

*Hedaya*, 37; Baillie, 50; Ameer Ali, 5th ed., Vol. II, p. 370. See sec. 210 below.

It has been held by the High Court of Allahabad that a Shia girl given in marriage by her father to a Sunni husband has an option of repudiation on attaining puberty unless it has been ratified by consummation or otherwise, the reason given being that it would be contrary to all rules of equity or justice to force such a marriage on her if on attaining puberty she considers the marriage to be repugnant to her religious sentiments (d). Following this case, a single judge of the Chief Court of Karachi has held that the wife was entitled to repudiate the marriage where the husband had been convicted for theft and was under trial on a charge of enticing or taking away or detaining with criminal intent a married woman (e).

**209A. Repudiation under the Dissolution of Muslim Marriages Act, 1939.**—By the Dissolution of Muslim Marriages Act, 1939, all restriction on the option of puberty in the case of a minor girl whose marriage has been arranged by a father or grandfather has been abolished, and under sec. 2 (vii) of the Act a wife is entitled to the dissolution of her marriage if she proves the following facts, namely, (1) the marriage has not been consummated, (2) the marriage took place before she attained the age of 15 years, and (3) she has repudiated the marriage before attaining the age of 18 years (f).

**210. Marriage brought about by other guardians: Option of puberty.**—When a marriage is contracted for a minor by any

(c) *Asia Bano v. Muhammad* (1925) 47 All. 823, 888-889, 89 I.C. 690, ('25) A.A. 720.  
(d) *Asia Bano v. Muhammad* (1925) 47 All. 823, 89 I.C. 690, ('25) A.A. 720; *Sibt Ahmad v. Amma Khatoon* (1928) 59 All. 753, 113 I.C. 484, ('29) A.A. 18.

(e) *Zubeda Begum v. Yaqub Mahomed* (1940) 190 I.C. 94, ('40) A.S. 145.

(f) Dissolution of Muslim Marriages Act, 1939, sec. 2 (vii); *Zubeda Begum v. Yaqub Mahomed* (1940) 190 I.C. 94, ('40) A.S. 145.

**8s.** guardian other than the father or father's father, the minor  
**210, 211** has the option to repudiate the marriage on, attaining  
 puberty (*g*). This is technically called the "option of  
 puberty" (*khyar-ul-bulugh*).

The right of repudiating the marriage is lost, in the case of a female, if after attaining puberty and after being informed of the marriage and of her right to repudiate it, she does not repudiate without unreasonable delay (*h*). The Dissolution of Muslim Marriages Act, 1939, however, gives her the right to repudiate the marriage before attaining the age of eighteen years, provided that the marriage has not been consummated. But in the case of a male, the right continues until he has ratified the marriage either expressly or impliedly as by payment of dower or by cohabitation.

*Hedaya*, 38; Baillie, 50-52; Maenaghten, p. 58, sec. 18. Consummation consented to by the wife before the exercise of the option extinguishes the option. Baillie, 51. But consummation does not validate a marriage which is void (*i*).

Filing a suit for dissolution is evidence of the fact that she has exercised her right of repudiation (*j*).

**Shia law.**—According to the Shia law, a marriage brought about by a person other than a father or grandfather is wholly ineffective until it is ratified by the minor on attaining puberty (*k*). See notes to sec. 208, "Shia law."

**211. Effect of repudiation.**—The mere exercise of the option of repudiation does not operate as a dissolution of the marriage. The repudiation must be confirmed by the Court. Until then the marriage subsists, and if either party to the marriage dies, the other will inherit from him or from her, as the case may be.

*Hedaya*, 37, 38; Baillie, 50. The woman may herself bring a suit for a declaration that she has exercised her option and repudiated the marriage. Or she may plead the repudiation in defence to her husband's suit against her for restitution of conjugal rights, and the Court may in that suit declare that the marriage has been repudiated (*l*). No such declaration, however, can be made, if she has permitted sexual intercourse with her after the exercise of the option.

- (*g*) *Mahomed Sharif v. Khuda Bai* 1836 164 I.O. 713, ('86) A.L. 683; *Abdul Karim v. Amina Bai* (1935) 59 Bom. 426, 37 Bom.L.R. 398, 157 I.C. 694, ('35) A.B. 808; *Jay Gunness Bibi v. Mohamad Ali Biewas* (1938) 1 Cal. 139, 174 I. O. 632, ('38) A.O. 71; *Ahmad Hussain v. Amir Banu* (1939) 185 I.O. 837, ('40) A.A. 63.  
 (*h*) *Biemillah v. Nur Muhammad* (1922) 44 All. 61, 63 I.O. 702, ('22) A.A. 155; *Rahmat Ali v. Mt. Allah* (1930) 11 Lah. 173, ('29) A.L. 527; *Mt. Mukhan v. Haidar* ('32) A.L. 449, 137 I.O. 739; *Mt. Azhan v. Jodha Ram* (1938) 40 P.L.R. 806, 178 I.O. 732, ('38) A.

- L. 719; *Aysha v. Mohamad Yunus* (1938) P.W.N. 656, 177 I. O. 514, ('38) A.P. 604.  
 (*i*) *Abul Kasem v. Jamila Khatun Bibi* (1940) 1 Cal. 401, 44 O. W. N. 352, 188 I.O. 490, ('40) A. O. 251; *Mt. Ahmad-un-nisa Begum v. Ali Akbar Shah* (1942) 199 I.O. 531, ('42) A. Pesh. 19.  
 (*j*) *Aysha v. Mohamad Yunus* (1938) P.W.N. 656, 177 I.O. 514, ('38) A.P. 604.  
 (*k*) *Mulka Jehan v. Mahomed* (1873) L.R.I.A. Sup. Vol. 192, 26 W. R. 26.  
 (*l*) *Badal Aurat v. Queen-Empress* (1891) 19 Cal. 79.

*Confirmed by the Court.*—It is not clear that any order of the Court is necessary. The Calcutta High Court has held that no decree is required to confirm the repudiation, but that an order of the Judge is necessary to impress on the act a judicial imprimatur (*m*). In a Lahore case the girl repudiated her marriage in an application to the Deputy Commissioner and then remarried. It was held that the marriage was not bigamous although the repudiation had not been confirmed by a Court (*n*). The Allahabad High Court has even said that a remarriage is in itself an exercise of the option (*o*)—but the observation is obiter as the Court had held that the first marriage was invalid.

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**212. Marriage of lunatics.**—The provisions of sections 207 to 211, relating to the marriage of minors, apply to the marriage of lunatics, with this difference that the option is to be exercised when the lunatic recovers his or her reason.

Baillie, 50-54

### B.—MAINTENANCE OF WIVES.

**213. Husband's duty to maintain his wife.**—The husband is bound to maintain his wife (unless she is too young for matrimonial intercourse) (*p*), so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him (*q*), or is otherwise disobedient (*r*), unless the refusal or disobedience is justified by non-payment of prompt (*s*. 221) dower (*s*).

**214. Order for maintenance.**—If the husband neglects or refuses to maintain his wife without any lawful cause, the wife may sue him for maintenance, but she is not entitled to a decree for *past* maintenance, unless the claim is based on a specific agreement (*t*). Or, she may apply for an order of maintenance under the provisions of the Code of Criminal Procedure, 1908, section 488, in which case the Court may order the husband to make a monthly allowance for her maintenance not exceeding one hundred rupees (*u*).

If the wife exercises her right under Mahomedan law and refuses to live with her husband on the ground of non-payment of prompt dower, she cannot enforce her right to maintenance under sec. 488 of the Code of Criminal Procedure (*v*). If the husband had agreed to pay the wife maintenance in case he

(m) *Mafisuddin Mondal v. Rakima Bibi* (1933) 58 Cal. L. J. 73, 87 Cal. W. N. 1048, 149 I. O. 1028, ('34) A. C. 104.

(n) *Ghulam Muhammad v. The Crown* (1933) 140 I. O. 617, ('33) A. L. 88.

(o) *Shah Ullah v. Emperor* (1934) A. L. J. 387, 150 I. O. 139, ('34) A. A. 569.

(p) Baillie, 441.

(q) Baillie, 442; *Mahomed Ali v. Mt. Ghulam Fatma* (1935) 160 I. O. 805, ('35) A. T. 200.

(r) *A. v. B.* (1896) 21 Bom. 77, at p. 82; *Mt. Khatoon v. Abdulla* (1942) Kar. 535, ('42) A. S. 65.

(s) Baillie, 442.

(t) *Abdool Futeh v. Zabunnessa* (1881) 6 Cal. 631.

(u) Rs. 100 was substituted for Rs. 50 by s. 131 of the Code of Criminal Procedure (Amendment) Act, 1923 (Act XVIII of 1923).

(v) *Muhammad Aswullah v. Abdul Halim* (1935) 154 I. O. 561, ('35) A. O. 285.

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marries a second wife, the wife cannot leave her husband's house and yet enforce the agreement (w).

*Shafes law.*—According to the Shafes school, the wife is entitled to past maintenance though there may be no agreement in respect thereof (x).

**215. Maintenance on divorce.**—(1) After divorce, the wife is entitled to maintenance during the period of *iddat* (y) [s. 199]. If the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce (z).

(2) A widow is not entitled to maintenance during the period of *iddat* consequent upon her husband's death (a).

*Order of maintenance under Criminal Procedure Code, 1908, sec. 488.*—Where an order is made for the maintenance of a wife under sec. 488 of the Criminal Procedure Code [s. 214], and the wife is afterwards divorced, the order ceases to operate on the expiration of the period of *iddat* (b). The result is that a Mahomedan may defeat an order made against him under sec. 488 by divorcing his wife immediately after the order is made. His obligation to maintain his wife will cease in that case on the completion of her *iddat*.

**215A. Agreement for future maintenance.**—An ante-nuptial agreement between a Mahomedan and his prospective wife, entered into with the object of securing the wife against ill-treatment and of ensuring her suitable maintenance in the event of ill-treatment, is not void as being against public policy (c). Similarly, an agreement between a Mahomedan and his first wife, made after his marriage with a second wife, providing for a certain maintenance for her if she could not in future get on with the second wife, is not void on the ground of public policy (d). Similarly, an agreement by a Mahomedan with his second wife that he would allow her to live in her parents' house and pay her maintenance is not against public policy (e). See secs. 216 (3) and 237A. It has been held in Bombay that an agreement for future separation between husband and wife is void as being against public policy under the Indian Contract Act, 1872, sec. 23. An agreement, therefore, which provides for a certain maintenance to be given to

(w) *Mahomed Als v. Mt. Ghulam Fatma* (1935) 160 I.O. 365, ('35) A.L. 902.

(x) *Mahomed Haji v. Kaimabi* (1918) 41 Mad. 211, 42 I.O. 517.

(y) *Hidaya*, 145; *Bailhe*, 450; *Muhammad Mariam v. Kadir Baksh* ('29) A.O. 527.

(z) *Rashid Ahmad v. Ansa Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52, 185 I.O. 762, ('32) A.P.O. 25; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 846-847, 141 I.O. 689, ('33) A.O. 27.

(a) *Apa Mahomed Jaffer v. Koolson Bees* (1897) 25 Cal. 9.

(b) *In re Abdul Ali* (1883) 7 Bom. 180;

*In the matter of Din Muhammad* (1882) 5 All. 226; *Shah Abu v. Ulfat Bibi* (1896) 19 All. 50; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 847, 141 I.O. 689, ('33) A.O. 27.

(c) *Muhammad Muin-ud-din v. Jamal* (1921) 43 All. 650, 63 I.O. 888, ('21) A.A. 152; *Muhammad Hamdan v. Muhammad* ('82) A.L. 65, 133 I.O. 888.

(d) *Mansur v. Arzu* (1928) 3 Luck. 603, 109 I.O. 812, ('28) A.O. 203.

(e) *Mt. Sakina Faruq v. Shamshad Khan* (1936) 165 I.O. 987, ('36) A.P.O. 195.

the wife in the event of a future separation between them, is also void (f). If the marriage is dissolved by divorce, the wife is entitled to maintenance for the period mentioned in sec. 215, and not for life, unless the agreement provides that it is for life (g).

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### C.—JUDICIAL PROCEEDINGS.

**216. Suit for restitution of conjugal rights.**—(1) Where a wife without lawful cause ceases to cohabit with her husband, the husband may sue the wife for restitution of conjugal rights (h).

The husband is not entitled to a decree if the marriage, though consummated, was an irregular marriage during the period of *iddat* (i), nor if the marriage took place during the minority of the wife and has been validly repudiated (j). See secs. 209 and 209A.

(2) *Cruelty*.—Cruelty, when it is of such a character as to render it unsafe for the wife to return to her husband's dominion, is a valid defence to such a suit. "It may be, too, that gross failure by the husband of the performance of the obligation, which the marriage contract imposes on him (s. 205) for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court" (k).

(3) *Agreement enabling wife to live separate from the husband*.—An agreement entered into before marriage by which it is provided that the wife should be at liberty to live with her parents after marriage is void, and does not afford an answer to a suit for restitution of conjugal rights (l). Similarly, an agreement, entered into after marriage between a husband and wife who were for some time before the date of the agreement living separate from each other, providing that they should resume cohabitation, but that if the wife should be unable to agree with the husband, she should be free to leave him, is void, and it is not a defence to the husband's suit for

(f) *Bas Fatma v. Alimahomed* (1913) 37 Bom. 280, 17 I.C. 946

(g) *Muhammad Munn-ud-din v. Jamal* (1921) 43 All. 650, 63 I.C. 853, ('21) A.A. 152 [stipulation for maintenance for life]; *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 833, 854, 141 I.C. 689, ('33) A.C. 27 [no stipulation for maintenance for life].

(h) *Moonshes Buzloor Ruheem v. Shumsoonissa Begum* (1867) 11 M.I.A. 661

(i) *Mt. Bakh Bibi v. Quam Din* ('84) A.L. 907, 154 I.C. 677.

(j) *Mt. Bhawan v. Gaman* (1934) 146 I.C. 292, ('84) A.L. 77; *Abdul Karim*

*v. Amina Bai* (1936) 59 Bom. 424, 157 I.C. 694, ('35) A.B. 308.

(k) *Moonshes Buzloor Ruheem v. Shumsoonissa Begum* (1867) 11 M.I.A. 651, 615, *Meherally v. Sakerkhanooobas* (1905) 7 Bom.L.R. 602, 608; *Hussain Begam v. Muhammad* (1907) 29 All. 222, *Hamid Hussain v. Kudra Begam* (1918) 40 All. 332, 44 I.C. 728; *Genu Mesh v. Begummah Bibi* ('33) A.R. 322

(l) *Abdul v. Hussaini* (1904) 6 Bom.L.R. 728; *Imam Ali v. Arfatunnessa* (1913) 18 Cal.W.N. 698, 21 I.C. 87; *Fatima Bibi v. Nur Muhammad* (1920) 1 Lah. 597, 60 I.C. 88.



**Ss.** restitution (*m*). See secs. 215A and 237A. But an agreement to allow a second wife to live in a separate house and to give her a maintenance allowance has been enforced (*n*).

(4) *Non-payment of prompt dower and restitution of conjugal rights*.—See sec. 222.

(5) *False charge of adultery by husband against wife*.—A false charge of adultery by a husband against his wife is a good ground for refusing a decree for restitution of conjugal rights (*o*). But if the charge is true, and it was made at a time when the wife was actually living in adultery, it is no ground for refusing a decree for restitution of conjugal rights (*p*). See sec. 240.

(6) *Expulsion of husband from caste*.—In a Bombay case, where the parties belonged to the Mussalman Kharwa community of Broach, the High Court refused to pass a decree for restitution of conjugal rights against the wife, on the ground that the husband having been expelled from the caste, the wife was not bound to live with him (*q*).

**216A. Suit for jactitation of marriage**.—A suit will lie between Mahomedans in British India for jactitation of a marriage (*r*).

Jactitation is a false pretence of being married to another. "There can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship and his heirs may be harassed by false claims after his death" (*s*).

**216B. Suit for breach of promise to marry**.—In a suit by a Mahomedan for damages for breach of promise to marry, the plaintiff is not entitled to damages peculiar to an action for breach of promise of marriage under the English law, but to a return merely of presents of money, ornaments, clothes and other things (*t*).

**216C. Suit for enticing away a wife**.—A Mahomedan husband can maintain a suit for damages against a person who persuades or entices his wife to live apart from him (*u*).

(*m*) *Meherally v Sakerkhanoo* (1905)

7 Bom L.R. 602

(*n*) *Mt. Sakina Faruq v. Shamshad Khan* (1936) 195 I.O. 937, ('36) A. Pesh. 195

(*o*) *Musammal Maqboolan v Ramzan* (1927) 2 Luck. 482, 101 I.O. 261, ('27) A.O. 154; *Jaun Beebes v Beepares* (1865) 3 W.R. 98.

(*p*) *Jamiruddin v. Sakara* (1927) 54 Cal. 363, 101 I.O. 60, ('27) A.O. 579.

(*q*) *Bai Jina v Kharwa Jina* (1907) 31 Bom. 366.

(*r*) (1897) 20 All. 98, 97, *supra*

(*t*) *Abdul Razak v Mahomed* (1918) 42

Cal. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Ludden (1887) 14 Cal. 276 [muta marriage].

(*u*) *Muhammad Ibrahim v. Gulam Ahmad* (1864) 1 Bom. H.C.R. 286; *Abdul Karim v. Amina Bai* (1935) 59 Bom. 426, 37 Bom L.R. 398, 157 I.O. 684, ('35) A.B. 308.

## CHAPTER XV.

### DOWER.

**217. Dower defined.**—*Mahr* or dower is a sum of money Ch. XV,  
or other property which the wife is entitled to receive from Ss.  
the husband in consideration of the marriage. 217, 218

See Baillie, 91.

*Consideration.*—The word consideration, is not used in the sense in which the word is used in the Contract Act. Under Mahomedan law dower is an obligation imposed upon the husband as a mark of respect to the wife (a). Mahmood, J., in *Abdul Kadir v. Salima* (b) said that it had been compared to the price in a contract of sale because marriage is a civil contract and sale is a typical contract to which Mahomedan jurists are accustomed to refer by way of analogy. If dower were the bride price a postnuptial agreement to pay dower would be void for want of consideration, but such an agreement is valid and enforceable (c).

**218. Specified dower.**—(1) The husband may settle any amount he likes by way of dower upon his wife, though it may be beyond his means, and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten *dirhams*.

(2) Where a claim is made under a contract of dower, the Court should, unless it is otherwise provided by any legislative enactment, award the entire sum provided in the contract (d).

*Hedaya*, 44; Baillie, 92.

*Dirham.*—The money value of 10 *dirhams* is between three and four rupees (e).

“Dower is often high among Mahomedans, to prevent the husband from divorcing his wife, in which case he would have to pay the amount stipulated” (f) and the mere fact that the amount stipulated is excessive or beyond the means of the husband is no defence to the wife’s claim (g). If the husband transfers a field to his wife as dower she is entitled as against him to a decree for possession. If there are other sharers in the field they are not necessary parties to her suit and the decree does not affect their rights (h).

- (a) Baillie, Vol. I, p. 91; *Abdul Kadir v. Salima* (1886) 8 All 149; *Mt. Fatima Bibi v. Lal Din* ('87) A.L. 845, 171 I.O. 421.  
(b) (1886) 8 All. 149. *supra*.  
(c) *Mt. Fatima Bibi v. Lal Din*, *supra*; *Jahuran Bibi v. Soleman Khan* (1934) 58 Cal.L.J. 251, 149 I.O. 1150, ('34) A.O. 210.  
(d) *Sagra Bibi v. Masuma Bibi* (1877) 2 All. 573 F.B.; *Banoo Begum v. Mir An Ali* (1907) 9 Bom.L.B. 188; *Badr Ali v. Hafs* (1909) 18 Cal.

- W.N. 153, 4 I.O. 462.  
(e) *Aema Bibi v. Abdul Samad* (1909) 82 All. 167, 5 I.O. 411.  
(f) *Zakeri Begum v. Sakina Begum* (1892) 19 I.A. 157, 165, 19 Cal. 689.  
(g) *Mahomed Sultan Begum v. Sarajuddin Ahmed* (1936) 161 I.O. 300, ('36) A.L. 188 A.M. Md. Ibrahim v. Ma Ma & anr. (1939) Rang. 383, 179 I.O. 47, ('39) A.B. 28.  
(h) *Mt. Gulbano v. Akbar Khalid* (1936) 164 I.O. 329, ('36) A. Pesh. 178.

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"Unless it is otherwise provided by any legislative enactment."—Under the Oudh Laws Act, 1876, sec. 5, the Court is not to award the amount of dower stipulated in the contract of marriage, but only such sum as "shall be reasonable with reference to the means of the husband and the status of the wife" (i). In *Zakeri Begum v. Sakina Begum* (j) the Privy Council held that the Act does not apply to a case in which a Mahomedan, residing outside Oudh, marries in Oudh a woman residing in Oudh.

**Shia law.**—Under the Shia law, there is no fixed legal minimum for dower: Baillie, II, 67, 68.

**219. Dower may be fixed after marriage.**—The amount of dower may be fixed either before or at the time of marriage, or after marriage (k); and can be increased after marriage (l).

**219A. Contract of dower may be made by father.**—A contract of dower made by a father on behalf of his minor son is binding on the son. Such a contract may be made even after marriage, provided the son was then a minor (m). Among Sunnis the father does not, by entering into such a contract, become personally liable for the dower debt, nor is he liable for it merely because he consents to the marriage (n). But by a recent decision of the Judicial Committee the rule is otherwise among Shias when the minor son has no means of his own (o). See Baillie, II, 80.

A person who guarantees the payment of dower by the husband is liable to the wife as surety (p).

"Minor" in this section means one who has not attained puberty (q).

**220. "Proper" dower.**—If the amount of dower is not fixed (s. 218), the wife is entitled to "proper" dower (*mahr-i-misl*), even if the marriage was contracted on the express condition that she should not claim any dower. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family, such as her father's sisters.

*Hedaya*, 45, 53; Baillie, 92, 95. The Judicial Committee have said that "Dower is an essential incident under the Mussalman law to the status of marriage; to such an extent is this so that when it is unspecified at the time the

(i) *Abdul Rahman v. Inayat Bibi* ('31) A.O. 63, 130 I.O. 113

(j) (1892) 19 I.A. 157, 19 Cal. 689; *Rukia Begum v. Muhammad* (1910) 32 All 477, 6 I.O. 568

(k) *Kamar-un-nissa v. Husain Bibi* (1880) 3 All. 266 F.B.; *Bashir Ahmad v. Zubaida* (1924) 1 Luck. 83, 92 I.O. 265, ('26) A.O. 136; *Musammam Aminna Bibi v. Muhammad* (1920) 4 Luck. 343; 114, I.O. 504, ('29) A.O. 520.

(l) *Jahuran Bibi v. Solesman Khan* (1933) 58 Cal.L.J. 251, 149 I.O. 1150, ('34) A.O. 210; *Mt. Narißen Bi v. Mt. Iqbal Begum* ('36) A.T. 816,

160 I.O. 805; *Chan Pir v. Fakar Shah* (1940) 189 I.O. 725, ('40) A.L. 104.

(m) *Basir Ali v. Hafiz* (1909) 13 Cal.W.N. 153, 4 I.O. 462.

(n) *Muhammad Siddiq v. Shahab-ud-din* (1927) 49 All. 557, 100 I.O. 636, ('27) A.A. 364.

(o) *Sabir Husain v. Farzand Khan* ('38) A.P.O. 80, reversing (1934) 56 All 401, 151 I.O. 304, ('34) A.A. 52.

(p) *Mt. Fatima Bibi v. Lal Din* ('37) A.L. 345, 171 I.O. 421

(q) *Mosharraf v. Abdul* ('25) A.O. 322, 89 I.O. 914.

marriage is contracted the law declares that it must be adjudged on definite principles" (r).

Shia law.—The proper dower under the Shia law should not exceed 500 *dirhams*: Baillie, II, 71. As to *dirham*, see notes to sec 218.

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221. "Prompt" and "deferred" dower.—(1) The amount of dower is usually split into two parts, one called "prompt," which is payable on demand, and the other called "deferred," which is payable on dissolution of marriage by death or divorce. See sec. 243 (2).

The prompt portion of the dower may be realised by the wife at any time before or after consummation (r1). Dower which is not paid at once may for that reason be described as deferred dower but if it is postponed until demanded by the wife it is in law prompt dower (s).

(2) Where it is not settled at the time of marriage whether the dower is to be prompt or deferred, then according to the Shia law, the rule is to regard the whole as prompt (t), but according to the Sunni law, the rule is to regard part as prompt and part as deferred; the proportion referable to each class being regulated by custom, and, in the absence of custom, by the status of the parties and the amount of the dower settled (u). The Madras High Court, however, has taken the view that whether the parties are Shias or Sunnis dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed "at least in the Madras Presidency, whatever the nature of the decisions in other provinces may be" (v). It is not clear whether, in a case in which no specific portion of the dower has been fixed as prompt, the Court has the power, under the Sunni law, to award the whole amount as prompt. The High Court of Bombay has held that the Court has such power (w).

Baillie, 92. In *Eidan v. Mashar Husain* (1877) 1 All. 483, the Court fixed one-fifth of a dower of Rs. 5,000 as "prompt," the wife having been a prostitute. In *Taufik-un-nissa v. Ghulam Kambar* (1877) 1 All. 506, the Court held

(r) *Hamira Bibi v. Zubaidah Bibi* (1916) 43 I.A. 294, 300, 38 All. 581, 36 I.O. 87, ('16) A.P.O. 46.

(r1) *Rehana Khatun v. Iqtidar Uddin* (1943) All L.J. 98, ('43) A.A. 184.

(s) *Mahadev Lal v. Bibi Maniran* (1938) 13 Pat. 297, 146 I.O. 219, ('38) A.P. 281.

(t) *Mirza Bedar Bukht v. Mirza Khurram Bukht* (1873) 19 W.R. 315 [P.O.]; *Masthan Sahib v. Assan Bibi* (1899) 23 Mad. 871 F.B.

(u) *Eidan v. Mashar Husain* (1877) 1 All. 483; *Taufik-un-nissa v. Ghulam Kambar* (1877) 1 All. 506; *Umda Begum v. Muhammad Begum* (1910) 38 All. 291, 9 I.O. 200; *Muhammad v. Saghir-un-nissa*

(1919) 41 All. 562, 50 I.O. 740; *Mussammatt Bibi v. Sheikh Muhammad* (1929) 8 Pat. 645, 117 I.C. 207, ('29) A.P. 207; *Mangut Rai v. Mt. Sakina Begum* (1934) All. L.J. 64, 49 I.C. 1211, ('34) A.A. 441; *Fatma Bibi v. Sadruddin* (1865) 2 B.H.O. 291, *Rehana Khatun v. Iqtidar Uddin*, *supra*.

(v) *Sheik Muhammad v. Ayesha Beebi* (1938) Mad. 609, (1937) 2 M.L.J. 779, 172 I.C. 798, ('38) A.M. 107, *Masthan Sahib v. Assan Bibi* (1900) 23 Mad. 871, 10 M.L.J. 128 (F.B.) considered and relied on.

(w) *Husseinkhan v. Gulab Khatun* (1911) 35 Bom. 386, 11 I.O. 558.

- Ss. 221-221B** that a *third* of a dower of Rs. 51,000 was reasonable as "prompt"; and the same proportion was fixed in *Fatma Bibi v. Sadruddin* (1865) 2 Bom.H.C. 291. In all these cases the parties were Sunnis, and the marriage contract was silent as to whether the dower was to be prompt or deferred.

**221A. Remission of dower by wife.**—The wife may remit the dower or any part thereof in favour of the husband or his heirs. Such a remission is valid though made without consideration (x) [Baillie, 553].

But the remission must have been made with free consent. A remission made by a wife when she is in great mental distress owing to her husband's death is not one made with free consent, and is not binding on her (y). The High Courts of Madras (z) and Patna (a) have held that a remission made by a wife who has not attained majority under the Indian Majority Act, 1875, is invalid, though she may have attained majority by Mahomedan law. The High Court of Allahabad has dissented from this view of the law and held that since the Indian Majority Act (sec. 2) does not affect the capacity of any person "to act in the matter of marriage or dower," a Mahomedan girl who has attained puberty is competent to relinquish her dower, though she may not have attained the age of majority (18 years) within the meaning of the Indian Majority Act (b). The Allahabad view is correct. A stipulation in a contract of dower that the wife should not be competent to remit her dower without the consent of her relations is valid (c).

- 221B. Suit for dower and limitation.**—If the dower is not paid, the wife, and, after her death, her heirs, may sue for it. The period of limitation for a suit to recover "prompt" dower is three years from the date when the dower is demanded and refused, or, where during the continuance of the marriage no such demand has been made, when the marriage is dissolved by death or divorce [Limitation Act, 1908, Sch. I, art. 103]. The period of limitation for a suit to recover "deferred" dower is three years from the date when the marriage is dissolved by death or divorce (*ibid.*, art. 104). Where, however, prompt dower has not been fixed, a demand and refusal is not a condition precedent for filing a suit for its recovery (d).

Limitation for prompt dower runs from the time when the dower is demanded and refused, but both demand and refusal must be unambiguous (e).

Limitation for "deferred" dower does not run against the widow during the period she is in lawful possession of her husband's property under a claim for her dower (f).

(x) *Jyani Begam v. Umrao Begam* (1908)

32 Bom. 612.

(y) *Nurunnissa v. Khaja Mahomed* (1920)

47 Cal. 537, 56 I.O. 8; *Hannumissa*

*Dadamissa v. Hannumissa Hafizulla*

(1942) 44 Bom.L.R. 126, ('42)

A.B. 128.

(z) *Abi Dhanunissa v. Mahommed* (1918)

41 Mad. 1026, 44 I.O. 203.

(a) *Najmunnissa v. Serajuddin Ahmed*

(1938) 17 Pat. 808, 180 I.O. 208,

('38) A.P. 139.

(b) *Qasim Hussain v. Bibi Kanis* (1932)

A.A. 649

(c) *Mt. Khadija Begum v. Nisar Ahmed*

(1930) A.L. 887.

(d) *Muhammad Taqi Khan v. Farooqodi*

*Begum* (1911)

L.J. 116.

A. 181.

(e) *Mt. Amtul Rasul v. Karim Baksh*

(1933) 142 I.O. 883, ('33) A.

Pesh. 81.

(f) *Hamid-ullah Khan v. Najjo* (1911) 83

All. 668, 10 I.O. 282.

Where a wife is divorced by a writing, time under articles 103 and 104 of the Limitation Act begins to run only from the date of communication of the writing to the wife (g). The wife has the right to bring an action for the recovery of prompt dower both before and after consummation of marriage. The consummation has not the effect of converting prompt dower into deferred dower (h).

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**Non-payment of prompt dower and restitution of conjugal rights.**—The wife may refuse to live with her husband and admit him to sexual intercourse so long as the prompt dower is not paid [Baillie, 125]. If the husband sues her for restitution of conjugal rights *before* sexual intercourse takes place, non-payment of the dower is a complete defence to the suit, and the suit will be dismissed. If the suit is brought *after* sexual intercourse has taken place with her free consent the proper decree to pass is not a decree of dismissal, but a decree for restitution conditional on payment of prompt dower (i).

See section 216 (4) and the cases there cited. Where a woman is pregnant at the time of her marriage, but conceals the pregnancy from her husband, the concealment does not render the marriage invalid, nor does she forfeit her right to prompt dower (j).

*Debitor non presumitur donare.*—The maxim means that a debtor is not presumed to give, that is, to make a gift. The maxim, however, has no application as between husband and wife. Thus where a Mahomedan paid various sums of money from time to time to his wife, and there was no evidence that the payments were allocated to the dower debt, it was held that the payments could not be treated as having been made in satisfaction of the debt, and that the wife was entitled to recover the full amount of her dower (k).

**222A. Liability of heirs for dower debt.**—The heirs of a deceased Mahomedan are *not personally* liable for the dower debt. As in the case of other debts due from the deceased, so in the case of a dower debt, each heir is liable for the debt to the extent only of a share of the debt proportionate to his share of the estate [s. 33]. Where the widow, therefore, is in possession of her husband's property under a claim for her dower [s. 224], the other heirs of her husband are severally entitled to recover their respective shares upon payment of a quota of the dower debt proportionate to those shares (l).

(g) *Bure Khan v. Mt. Khadim Bibi* (1941) 198 I.C. 326, ('41) A.L. 166.

(h) *Muhammad Taqi Khan v. Farmoodi Begum* (1941) All. 826, (1941) A.L.J. 118, 195 I.C. 858, ('41) A.A. 181; *Mt. Pukhras Begum v. Hidayat Ali Shah* (1988) 178 I.C. 182, ('88) A. Pesh. 72.

(i) *Abdul Kadir v. Sahma* (1888) 8 All. 149; *Kunhi v. Moidin*, (1888) 11 Mad. 327; *Bai Hansa v. Abdullah* (1905) 30 Bom. 122; *Hamidunnessa v. Zohiruddin* (1890) 17 Cal.

670; *Anus Begum v. Muhammad Isfaja* (1933) 55 All. 743, 148 I.C. 26, ('33) A.A. 634; *Bashiram Bi v. Abdul Wahab Khan* (1941) 188 I.C. 180.

(j) *Kulsumbi v. Abdul Kadir* (1921) 45 Bom. 151, 59 I.C. 433, ('21) A.B. 205.

(k) *Mohammad Sadiq v. Fakhr Jahan* (1932) 59 I.A. 1, 6 Luck. 556, 136 I.C. 385, ('32) A.P.O. 18.

(l) *Hamira Bibi v. Zubaida Bibi* (1916) 48 I.A. 294, 38 All. 581, 36 I.C. 87.

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**222A, 223** A Mahomedan dies leaving a widow, a son, and two daughters. The widow is entitled to a dower debt of Rs. 3,200. The widow's share in the estate is  $\frac{1}{8}$  and she is liable to contribute Rs.  $\frac{1}{8} \times 3,200 =$  Rs. 400. The son's share is  $\frac{7}{16}$ , and he is liable to pay Rs.  $\frac{7}{16} \times 3,200 =$  Rs. 1,400, and if the widow is in possession, he is entitled to recover his share on payment of Rs. 1,400. The share of each daughter is  $\frac{7}{32}$ , and she is liable to pay Rs.  $\frac{7}{32} \times 3,200 =$  Rs. 700, and if the widow is in possession, she is entitled to recover her share on payment of Rs. 700.

**223. Dower is a debt, but an unsecured debt.**—(1) The dower ranks as a debt, and the widow is entitled, along with other creditors of her deceased husband, to have it satisfied on his death out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that she has a right of retention to the extent mentioned in sec. 224 below (m). She is not entitled to any charge on her husband's property, though such a charge may be created by agreement (n).

(2) *Whether a charge for a dower debt may be created by a decree.*—There is no doubt that it is within the competence of a Court to create a charge by its decree for a dower debt, so that if such a charge is created, and the decree has not been appealed against and has become final, effect will be given to the charge; in other words, a decree creating a charge is not a nullity for want of jurisdiction (o). But though it is not beyond the power of a Court to pass a decree creating a charge, it will not ordinarily do so. To pass such a decree is to give the dower debt a priority over other debts due from the deceased. The proper decree to make is a *simple money decree*; and no charge is created merely because the decree directs execution by sale of properties mentioned (p). If a decree is passed creating a charge, the proper course for the Appellate Court is to set it aside to that extent (q).

(3) *Alienation by heir before payment of dower debt.*—The right of an heir to alienate his own share as stated in sec. 32 (1) above, is not affected by the fact that the dower debt has not been paid. But if the widow is in possession in

(m) *Bebee Bachun v. Sheikh Hamid* (1871) 14 M.I.A. 377, 383-884; *Hamira Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 301, 38 All. 581, 36 I.O. 87; *Mt. Sarbanbi v. Kari Muhammadali* (1941) Nag. 164, (1940) N.L.J. 647, 192 I.O. 286, (41) A.N. 8; *Muniram v. Mukhtyar Begum* (1940) A.L.J. 789, (40) A.A. 521.

(n) *Ameer-oon-Nissa v. Moored-oon-Nissa*

(1856) 6 M.I.A. 211.  
 (o) *Qasim Hussain v. Habibur Rahman* (1929) 56 I.A. 254, 258, 8 Pat. 926, 81 Bom.L.R. 879, 117 I.C. 10, (29) A.P.C. 174; *Mahomed Wajid v. Basayet Hossein* (1878) 5 I.A. 211, 223-224, 4 Cal. 802.  
 (p) *Mt. Ahmadi Begum v. Abdullah* (1934) 151 I.C. 1013, (294) A.O. 437.  
 (q) *Abdul Rahman v. Inayat Bibi* (31) A.O. 68, 180 I.C. 113.

lieu of her dower at the date of alienation, the alienation will be subject to her right to retain possession (*r*). Ch. XV,  
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The dower debt stands on the same footing as an ordinary debt. An heir therefore may alienate his own share before payment of the dower debt just as he can alienate it before payment of any other unsecured debt, as so to pass a good title to the alienee.

. 224. Widow's right to retain possession of husband's estate in lieu of dower.—(1) The widow's claim for dower does not entitle her to a charge on any specific property of her deceased husband [s. 223]. But when she is in possession of the property of her deceased husband, having, "lawfully and without force or fraud" obtained such possession "in lieu of her dower" (that is on the ground of her claim for her dower, to satisfy her claim out of the rents and profits and with a liability to account for the balance), she is entitled as against the other heirs of her husband (*s*) and as against the creditors of her husband (*t*) to retain that possession until her dower is satisfied. The right to retain possession is extinguished on payment of the dower debt. This right is sometimes called a "lien," but it is not a lien in the strict sense of the term.

There is a conflict of opinion whether it is necessary, to entitle the widow to retain possession of her husband's property, that the possession should have been obtained by her not only "lawfully and without force or fraud," but also "with the express or implied consent of the husband or his other heirs." The High Courts of Madras (*u*) and Bombay (*v*) have held that no such consent is necessary. The High Courts of Calcutta (*w*) and Patna (*x*) have held that it is. In two earlier cases the High Court of Allahabad held that such consent was necessary (*y*); in later cases it has held

(*r*) *Basayet Hossein v. Doolichand* (1878) 5 I.A. 211, 4 Cal 402.

(*s*) *Bebee Bachun v. Sheekh Lamiid* (1871) 74 M.L.A. 377; *Manna Bibi v. Chaudhri Yaku* (1925) 52 I.A. 145, 149-150, 47 All. 250, 254-255, 86 I.C. 179, (25) A.P.C. 63; *Jahuran Bibi v. Solomon Khan* (1933) 58 Cal.L.J. 251, 149 I.C. 1150, ('84) A.O. 210; *Mt. Nawab Begum v. Hussain Ali Khan* (1937) 18 Lah. 649, ('87) A.L. 738.

(*t*) *Mt. Ghafooran v. Ram Chandra Das* ('84) A.A. 188; *Kulsum Bibi v. Shams Sunder Lal* (1936) All.L.J. 1037, 164 I.C. 515, ('86) A.A. 600.

(*u*) *Beeju Bee v. Syed Moorthiya* (1920) 43 Mad. 214, 53 I.C. 905.

(*v*) *Haenumiya Dadamiya v. Hatimunnissa Hafizulla* (1942) 44 Bom.L.R. 126, ('42) A.B. 128.

(*w*) *Sahur Bibi v. Imaul* (1924) 51 Cal 124, 80 I.C. 294, ('24) A.C. 503, dissenting from *Sahabjan v. Anas-uddin* (1911) 38 Cal. 475, 9 I.C. 1031.

(*x*) *Mohammad Zobair v. Mt. Bibi Sahidan* Pat. 798, 197 I.C. 241.

*al-un-nissa v. Bashir-un-nissa* 394) 17 All. 77; *Muhammad Karim-Ullah v. Amani Begam* (1894) 17 All. 98.



**Ss.** that no such consent is necessary (z). In a recent case, **224, 224A** however, it has again held that such consent is necessary (a).

(2) A widow, who has not obtained possession of her husband's estate in lieu of her dower, cannot exclude the other heirs of her husband from possession. They are entitled to joint possession with her, and if they claim such possession, she is not entitled to say, "I will now go into possession." Her only right is to retain possession of what she has before they obtained possession (b).

If a widow has been in possession of her husband's property in his lifetime and continues in possession after his death, the presumption is that her possession has been lawfully obtained and is in lieu of dower (c). But if the husband has been in possession and the widow takes possession after his death and falsely claims that her dower has been increased, she has no right of retainer (d). Nor is she entitled to a returner on the mere ground of permissive occupation (e).

#### **224A. Right of retention not analogous to a mortgage.-**

The position of a widow claiming to retain possession of her husband's property until her dower debt is paid is essentially different from that of a mortgagee (usufructuary or other) to whom the owner pledges his property to secure repayment of a debt. There is no real or true analogy between the two (f). See sub-sec. 2 of sec. 224.

[A died leaving a widow and a sister. Some time after A's death, the widow applied to the Collector to have the entire estate of A registered in her name, alleging that she had been in possession of the lands as an heir and also on account of her dower. The application was opposed by the sister, but the properties were registered in the widow's name. After ten years, the sister brought a suit against the widow to recover her share (three-fourths) in the estate of A. The widow contended that she was entitled to remain in possession of the estate until the dower debt was paid. It was held by the Privy Council that the widow was entitled to retain possession until her dower was satisfied: *Bebee Bachun v. Sheikh Hamid* (1871) 14 M.I.A. 377.]

1. *Having obtained possession lawfully and without force or fraud.*—In *Bebee Bachun's* case cited in the above illustration, their Lordships of the Privy Council at p. 384 said: "The appellant (widow) having obtained actual and lawful possession of the estate under a claim to hold them as heir for her dower, their Lordships are of opinion, that she is entitled to retain that possession until her dower is satisfied . . . It is not necessary to say whether this right of the widow in possession is a lien in the strict sense of the term, although

- (z) *Ramzan Ali v. Asghari Begum* (1910) 32 All. 563, 566, 6 I.C. 405; *Muhammad Shoaib v. Zaib Jahan* (1928) 50 All. 423, ('27) A.A. 850; *Imtiyaz Begum v. Abdul Korim* (1931) 53 All. 31, 128 I.C. 760, ('30) A.A. 881; *Zamin Ali v. Aziz-un-nissa* (1933) 55 All. 139, 144 I.C. 438, ('33) A.A. 329.  
(a) *Mt. Inhar Fatma Bibi v. Mt. Anwar Bibi* (1939) A.L.J. 642, 182 I.C. 801, ('39) A.A. 348.  
(b) *Tahir-un-nissa v. Nawab Hasan* (1914)

- 36 All. 556, 24 I.C. 938.  
(c) *Abdul Sattar v. Mt. Agida Bibi* (1927) 100 I.C. 599, ('27) A.A. 319; *Fahman v. Balagi* (1935) 10 Luck. 440, 153 I.C. 93, ('35) A.O. 68; *Jahuran Bibi v. Soleman Khan* (1934) 58 Cal. L.J. 261, 149 I.C. 1150, ('34) A.C. 10.  
(d) *Jahuran Bibi v. Soleman Khan*, *supra*.  
(e) *Mt. Sampat Bibi v. Mir Hekhoob Ali* (1938) All. L.J. 911, 164 I.C. 290, ('38) A.A. 528.  
(f) *Maina Bibi v. Chaudhri Fakir* (1925)

no doubt the right is so stated in a judgment of the High Court in the case of *Ahmed Hossein v. Mussamut Khodeja* (1868) 10 W.R. 369. Whatever the right may be called, it appears to be founded on the power of the widow, as a creditor for her dower, to hold the property of her husband, of which she had lawfully and without force or fraud, obtained possession, until her debt is satisfied, with the liability to account, to those entitled to the property, subject to the claim for the profits received."

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2. The conflict referred to in the second paragraph of sub-sec. (1) of sec. 224 arose from the judgment of the Privy Council in a later case *Hamira Bibi v. Zubaida Bibi* (g). In that case their Lordships said:—

"But the dower ranks as a debt, and the wife is entitled, along with other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor, except that if she lawfully, with the express or implied consent of the husband, or his other heirs, obtain possession of the whole or part of his estate, to satisfy her claim with the rents . . . accruing therefrom, she is entitled to retain such possession until it is satisfied. This is called the widow's lien for dower, and this is the only creditor's lien of the Mussulman law which has received recognition in the British Indian Courts and at this Board."

3. The Madras High Court holds that the observations of their Lordships of the Privy Council in the clause printed in italics above were *obiter dicta*. The Calcutta High Court holds, dissenting from the Madras High Court, that their Lordships were, in the above passage, defining the nature of the widow's dower debt and her right to retain possession of her husband's property, and that the observations were not *obiter*. It is noticeable that there is no suggestion as to the consent of the husband or his heirs in the judgment of the Privy Council in the subsequent case of *Maina Bibi v. Chaudhri Yakut Ahmad* (h). It was argued in that case that the position of a widow in possession of her husband's estate was analogous to that of a mortgagee in possession. But this argument was not accepted by their Lordships. Their Lordships observed that "in the case of a mortgage the mortgagee takes and retains possession under an agreement or arrangement made between him and the mortgagor," but in the case of a Muhomedan widow who obtains possession under a claim for her dower "neither the possession of the property nor the right to retain that possession when acquired is conferred upon the widow by the agreement or bounty of her deceased husband. The possession of the property being once peaceably and lawfully acquired, the right of the widow to retain it till her dower debt is paid is conferred upon her by the Mahomedan law."

**224B. Right of retention gives no title.**—The right to hold possession does not give the widow any title to the property. It enables her only to retain possession of the property of which she has obtained possession [sec. 224], and, if she is dispossessed, to sue for recovery of possession [s. 225B]. The title to the property is in the heirs including, of course, the widow. But her right to hold possession has nothing to do with the interest which she has as an heir in the property. As an heir she has the rights and remedies of an heir (i).

(a) 1916] 48 I.A. 294, 301, 38 All.  
581, 588, 86 I.O. 87.

(h) (1924) 52 I.A. 146, 150-151, 47 All.  
250, 255-256, 86 I.O. 579, ('25)  
A.P.O. 68.

(i) See *Maharaj Singh v. Ahmad Hussein*

- Ss.** **224C. No right of retention during continuance of marriage.—**  
**224C-225** The right of retention arises for the first time on the husband's death, unless the marriage is dissolved by divorce, in which case it arises on divorce (*j*).

It follows from this that if a creditor of the husband obtains a decree against him, and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree, and she must deliver possession to him. —

**224D. Liability of widow in possession to account.—**A widow in possession of her husband's estate in lieu of dower is bound to account to the other heirs of her husband for the rents and profits received by her out of the estate (*k*). But she is entitled in that case to compensation for forbearing to enforce her right to the dower debt; this compensation is allowed in the form of interest on the dower debt (*l*).

**225. No right to alienate property to satisfy dower debt.—**(1) The right of a widow to retain possession of her husband's property under a claim for her dower does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise (*m*). If she alienates the property, the alienation is valid to the extent of her own share; it does not affect the shares of the other heirs of her husband.

(2) If besides alienating the property, she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower debt. The widow is not entitled, on the alienation being set aside, to be restored back to possession; by giving up possession of the property, she lost her right to hold possession thereof. Whether she also loses her right to recover the dower debt is an open question (*n*).

- (1928) 50 All. 86, 103 I.O. 368.  
 ('27) A.A. 534.  
 (j) *Narayana v. Byars* (1922) 45 Mad. 103, 69 I.O. 977, ('24) A.M. 57; *Abdul Rahman v. Inayat Bibi* ('81) A.O. 63, 130 I.O. 113. See also *Ameer Ammal v. Sankaranarayanan* (1900) 25 Mad. 658; *Asia Khatun v. Amarendra Nath* (1940) 44 C.W. N. 586, 191 I.O. 789, ('40) A.O. 578.  
 (k) *Deben Bachun v. Sheikh Hamed* (1871) 14 M.L.A. 377, 864.  
 (l) *Hamra Bibi v. Zubaida Bibi* (1916) 43 I.A. 294, 38 All. 581, 36 I.C. 87, affing (1910) 33 All. 182, 7 I.O. 497 [Interest allowed at 6 per cent. per annum]; *Woomatod v. Meerumun-nusa* (1868) 9 W.R. 518; *Sulebjan v. Anasruddin* (1911) 38 Cal. 475, 480-481, 9 I.O. 1031, *Nawab Begum v. Dabros* (1926) 48 All. 803, 98 I.O. 978, ('26) A. A. 89 [awarding of interest discretionary]; *Shankar Dass v. Mahbub Jan* ('42) A. Peah. 92.  
 (m) *Ohuki Bibi v. Shams-un-nusa* (1894) 17 All. 19 [mortgage]; *Maina Bibi v. Chaudhri Fakir* (1925) 52 I.A. 145, 47 All. 250, 86 I.O. 579, ('25) A.F.C. 63 affing. (1919) 41 All. 588, 61 I.O. 242 [aff]; *Beefu Bee v. Syed Moorthya* (1920) 48 Mad. 214, 238, 53 I.O. 905 [sale].  
 (n) *Musammal Sitaram v. Ganesh* (1927) 2 Luck., 558, 101 I.O. 714, ('28) A.O. 209; *Fahiman v. Bulagi* (1935) 10 Luck. 440, 153 I.O. 93, ('35) A.O. 68.  
 (o) *Maina Bibi v. Chaudhri Fakir* (1925)

(3) If the widow alienates the property, but does not deliver possession thereof to the alienee, as where she executes a mortgage without possession, the other heirs are entitled to a declaration that the mortgage does not bind their shares, but they are not entitled to immediate and unconditional possession thereof. Ch. XV,  
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If the widow sells or makes a gift of the property, the sale or gift is valid to the extent of her own share in the property. It has been said in some cases that the sale or gift is void altogether so as not to take effect to the extent even of the widow's share (o), but there is nothing in the judgments in those cases to justify that view.

This section relates to the effect of an alienation and of delivery of possession by the widow to the alienee of the *property itself*. The next section relates to the effect of a transfer by her of her *right of retention*. See ill (b) to sec. 225A.

### 225A. Whether right of retention is heritable and transferable.—

(1) There is a conflict of opinion whether the widow's right to hold possession is transferable and heritable. One view is that the right is a *personal* right, and it cannot therefore be transferred by sale, gift or otherwise (p) nor can it pass to her heirs on her death (q). The other view is that the right to hold possession is *property*. But is the right both heritable and transferable? It has been held in some cases that it is heritable, without expressing any opinion whether it is also transferable (r). In other cases it has been held that it is both transferable and heritable (s). If it is transferable, can it be transferred without transferring also the dower debt? Here again there is a difference of opinion. In some cases it has been held that the right to hold possession cannot be severed from the dower debt and transferred as a separate interest (t). In other cases it has been held that it

- 52 I.A. 145, 47 All 250, 86 I.O. 579, ('26) A.P.O. 68 [suit by heirs to recover their own shares]; *Musammal Sitaram v. Ganesh* (1927) 3 Luck. 558, 101 I.O. 714, ('28) A.O. 209 [suit by heirs to recover their own shares].
- (e) *Chulji Bibi v. Shams-un-nissa* (1894) 17 All. 19; *Musammal Bibi v. Musammal Bibi* (1928) 2 Pat. 84, 70 I.O. 82, ('28) A.P. 88.
- (p) *Muzaffar Ali v. Parbati* (1907) 29 All. 640; See *Mohammad Zobair v. Mt. Bibi Sakidan* (1941) Pat. 798, 197 I.O. 241, ('42) A.P. 210.
- (q) *Hadi Ali v. Akbar Ali* (1898) 20 All. 262.
- (r) *Arzuallah v. Ahmad* (1886) 7 All. 858; *Majidman v. Bibisachab* (1916) 40 Bom. 84, 80 I.O. 870; *Janbi Bibi v. Abbas Ali* (1941) N.L.J. 181, 195 I.O. 706, ('41) A.N. 167.

- (s) *Ali Baksh v. Allahdad* (1910) 32 All. 561, 561, 6 I.O. 876; *Amir Hasan v. Mohammad* (1932) 54 All. 499, 136 I.O. 833, ('32) A.A. 345; *Abdulla v. Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.O. 888, ('21) A.A. 262; *Beeyu Bess v. Syed Moorthiya* (1920) 48 Mad. 214, 237, 53 I.O. 905; *Majidman v. Bibisachab* (1916) 40 Bom. 84, 47-49, 80 I.O. 870; *Musammal Bibi v. Musammal Bibi* (1923) 2 Pat. 84, 70 I.O. 312, ('23) A.P. 88; *Musammal Sayia v. Musammal Kildan* (1928) 7 Pat. 141, 107 I.O. 319, ('28) A.P. 224; *Sheikh Abdur Rahman v. Sheikh Wali* (1928) 2 Pat. 76, 68 I.O. 601, ('28) A.P. 72.
- (t) *Ali Baksh v. Allahdad* (1910) 32 All. 561, 567, 6 I.O. 876; *Amir Hasan v. Mohammad* (1932) 54 All. 499,

**S. 225A** can be so transferred (u). But a transfer merely of the dower debt does not pass to the transferee the right to hold possession (v). In *Maina Bibi v. Chaudhri Wakil* (w), the Privy Council expressed a doubt whether a widow can transfer either the dower debt or the right to hold possession. All that can now be said with certainty is that the right to hold possession is heritable. Though it cannot be said with certainty whether it is also transferable, the balance of authority in India is in favour of the view that it is also transferable (w1).

(2) Assuming that a widow can transfer her dower debt and her right to hold possession till that debt is paid, a deed executed by her, which fails to effect a transfer of the *ownership* with which it purports to deal, cannot operate to transfer the dower debt and the right to hold possession (x).

#### Illustrations.

[(a) A Mahomedan dies leaving a widow, a daughter, and his father. The widow is in lawful possession of her husband's property in lieu of her dower. The widow dies leaving the daughter as her only heir. The daughter is entitled to retain possession of the property. The father is not entitled to possession of his share until he pays his proportionate share of the dower debt. But if the widow herself has not obtained possession in her lifetime, the daughter as her heir is not entitled to go into possession (y).

(b) A Mahomedan dies leaving a widow and a brother. The widow is in lawful possession of her husband's property in lieu of her dower. The brother is not entitled to possession of his share until he pays his proportionate share of the dower debt [s. 226]. The dower debt remains unsatisfied, and the widow sells the whole property to satisfy the debt, and delivers possession thereof to the purchaser. The sale-deed does not purport or attempt to transfer the dower debt or the right to hold possession to the purchaser, assuming that they could be transferred. What is the effect of the sale? The sale passes to the purchaser only the widow's share and the right to the possession of that share [s. 225]. What is the effect of the delivery of possession to the purchaser? The effect is that the brother, who was not entitled, before delivery of possession, to possession of his share until he paid his share of the dower debt, becomes entitled to immediate possession of his share without paying his share of the debt [see s. 222A]. The purchaser is not entitled to retain possession of the brother's share until the brother pays his share of the dower debt; the reason is that the deed does not purport to transfer to him either the dower debt or

136 I.C. 833, ('32) A.A. 345; *Sheikh Abdur Rahman v. Sheikh Wali* (1923) 2 Pat. 75, 68 I.O. 601, ('23) A.P. 72; *Nooh Ali v. Shamsunnissa Bibi* (1939) All. 322 (1939) A.L.J. 138, 183 I.O. 879, ('39) A.A. 819.  
(u) *Abdulla v. Shams-ul-Haq* (1921) 43 All. 127, 131, 58 I.O. 883, ('21) A.A. 262; *Musammam Bibi v. Musammam Bibi* (1923) 3 Pat. 84, 70 I.O. 312, ('23) A.P. 83; *Musammam Sogya v. Musammam Kidaban* (1928) 7 Pat. 141, 107 I.O. 819, ('28) A.P. 224.  
(v) *Amir Hasan v. Mohammad* (1932) 54

All. 499, 136 I.O. 833, ('32) A.A. 345.  
(w) (1925) 52 I.A. 145, 159, 47 All. 250, 262, 86 I.O. 579, ('25) A.P. 63.  
(w1) *Gooverbai v. Hayatbi* (1943) 45 Bom. L.R. 780.  
(x) *Mauva Bibi v. Chaudhri Wakil* (1925) 52 I.A. 145, 47 All. 250, 86 I.O. 579, ('25) A.P. 63; *Musammam Sitaram v. Ganesh* (1927) 3 Luck. 553, 101 I.O. 714, ('28) A.O. 209; See *Mohammad Zobair v. Mt. Bibi Sahidan* (1941) Pat. 798, 197 I.O. 241, ('42) A.P. 210.  
(y) *Tahir-un-nissa v. Nawab Hasan* (1914) 86 All. 558, 24 I.O. 988.

the right to hold possession. Nor is the widow entitled to have the possession restored back to her, for by giving up possession, she lost her right to hold possession. \*The purchaser has his remedy for the price paid by him against the widow. Whether the widow is entitled to recover the dower debt out of the other properties of her husband, is an open question. Probably she is]

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### 225B. Suit for possession by widow who is dispossessed.—

If a widow who is in possession of her husband's property under a claim for her dower, is wrongfully deprived of her possession, she may bring a suit for recovery of possession (z). If the property is immovable, the suit must be brought within six months from the date of dispossession (a) [Limitation Act, 1908, Sch. I, art. 3]. If it is movable, it must be brought within three years from the date on which she first learns in whose possession it is [*ibid.*, art. 48].

The widow's right to sue for possession has nothing to do with her right to hold possession. It is the ordinary right of a person who, though he has no title to the property (s. 224B), is entitled to sue for possession, if he is wrongfully dispossessed. In the case of immovable property, such right is given by the Specific Relief Act, 1877, sec. 9. In the case of movables, the right to sue is a common law right.

### 225C. Widow's possession no bar to a suit for dower.—

(1) The fact that a widow is in possession of her husband's property under a claim for her dower, is no bar to a suit by her against the other heirs of her husband to recover the dower debt. But she must in such a suit offer to give up possession of the property (b). She cannot both retain possession and have a decree for her dower debt.

(2) If she sues for part only of the dower debt, she cannot afterwards sue for the balance of the debt (c). See Code of Civil Procedure, 1908, O. 2, r. 2.

It has been held in Calcutta (d) that if the widow is in possession of her husband's property under a claim for her dower, the proper course for her to follow is to bring an administration suit in which the property can be placed in the hands of the Court, an account be taken of the profits received by her and of the interest due to her on the dower debt, and appropriate directions given for the satisfaction of her claim by sale of the assets or otherwise.

### 226. Suit by heirs for their shares and res judicata.—

Where in a suit against the widow by the other heirs of her husband for recovery of their shares a decree is passed

(z) *Majidman v. Bibisheeb* (1916) 40 Bom. 34, 49-50, 80 I.O. 870 (suit by a widow and heirs of a deceased co-widow); *Azizullah v. Ahmad* (1885) 7 All. 353 (suit by heirs of a deceased widow).  
(a) *Mahal Singh v. Ahmad Husain* (1928) 50 All. 86, 103 I.O. 868, ('27) A. A. 534.  
(b) *Ghulam Ali v. Sagir-ul-nissa* (1901) 23

All. 432.  
(c) *Kanis Fatima v. Ram Nandan* (1923) 45 All. 384, 73 I.O. 977, ('23) A.A. 331.  
(d) *Mirza Mohammad v. Shazadi Wahida* (1914) 19 O.W.N. 502, 28 I.O. 191. See also *Darvishammal v. Pasari* ('25) A.M. 1064, 88 I.O. 867.

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for possession conditional upon their paying their proportionate amount of the dower debt within a specified time, and the decree provides that if the plaintiffs fail to pay the decretal amount within that time the suit should be dismissed, and the suit is eventually dismissed for non-payment, the dismissal does not operate as *res judicata* so as to bar a subsequent suit by the same plaintiffs against the widow for possession of the same property based upon the ground that the dower debt has since been satisfied from the income of the property. The non-fulfilment of the condition attached to the decree extinguishes only the right to recover *immediate* possession. It does not extinguish the proprietary interest of the heirs of their right to recover possession when the dower debt is satisfied *at some future time* either by the plaintiffs or out of the profits of the property. The effect of dismissal is simply to relegate the parties to the position in which they were before the first suit was brought (e).

**226A. Kharch-i-pandan.**—Kharch-i-pandan literally means betel box expenses and is a personal allowance to the wife customary among Mahomedan families of rank. The allowance is also called an allowance for mewa khori (f). When the parties are minors the contract is made between the respective parents, and in such a case the wife as beneficiary is entitled to enforce it (g).

(e) *Maina Bibi v. Ohaudhri Yakul* (1925) 52 I.A. 145, 47 All. 250, 86 I.O. 579, ('25) A.F.O. 63; *Nawaz Begam v. Dalafroz* (1926) 48 All. 803, 98 I.O. 978, ('27) A.A. 39.  
(f) *Sikandra Ara v. Haran Ara* (1936) 105 I.O. 70, ('36) A.O. 196

(g) *Ehtoja Muhammad v. Husain Begam* (1910) 37 I.A. 152, 32 All. 410, 7 I.O. 237; *Muhammad Ali v. Fatma* (1930) 11 Lah. 85, 119 I.O. 486, ('29) A.L. 660; *Sajjad Ali Khan v. Badshah Begum* (1936) 164 I.O. 823, ('36) A.O. 885

## CHAPTER XVI.

### DIVORCE.

#### A. Divorce by husband.

**227. Different forms of divorce.**—The contract of marriage under the Mahomedan law may be dissolved in any one of the following ways: (1) by the husband at his will, without the intervention of a Court; (2) by mutual consent of the husband and wife, without the intervention of a Court; (3) by a judicial decree at the suit of the husband or wife. The wife cannot divorce herself from her husband without his consent, except under a contract whether made before or after marriage [s. 233], but she may, in some cases, obtain a divorce by judicial decree [ss. 239-241].

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When the divorce proceeds from the husband, it is called *talak* (ss. 228-234); when it is effected by mutual consent, it is called *khula* (s. 235) or *mubara'at* (s. 236) according to the terms of the contract between the parties.

**228. Divorce by talak.**—Any Mahomedan of sound mind, who has attained puberty, may divorce his wife whenever he desires without assigning any cause (*a*).

Macnaghten, p. 59; *Hedayat*, 75; Baillie, 208-209.

**228A. Contingent Divorce.**—A divorce may be pronounced so as to take effect on the happening of a future event. In an Allahabad case the husband agreed to pay his wife maintenance within a specified time and in default the writing to operate as a divorce. It was held that on the husband's default the writing took effect as a valid divorce (*b*).

**229. Talak may be oral or in writing.**—A talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama (*c*).

(a) *Ahmad Kasim v. Khatun Bibi* (1932) 59 Cal. 333, 141 I.O. 689, ('33) A.O. 27.

(b) *Bachchoo v. Biemullah* (1936) All L.J. 302, 163 I.O. 228, ('36) A.A. 387.

(c) See *Ma Mi v. Kallander Ammal* (1927) 54 I.A. 61, 5 Rang. 18, 100 I.O. 1, ('27) A.P.C. 15 affirming 2 Rang. 400.



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(1) *Oral Talak*.—No particular form of words is prescribed for effecting a talak. If the words are express (*saheeh*) or well understood as implying divorce no proof of intention is required. If the words are ambiguous (*kinayat*), the intention must be proved (*d*). It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her (*e*). In a Calcutta case the husband merely pronounced the word “talak” before a family council and this was held to be invalid as the wife was not named (*f*). This case was cited with approval by the Judicial Committee in a case where the talak was valid though pronounced in the wife’s absence, as the wife was named (*g*). The Madras High Court has also held that the words should refer to the wife (*h*). The talak pronounced in the absence of the wife takes effect though not communicated to her, but for purposes of dower it is necessary that it should come to her knowledge (*i*); and her alimony may continue till she is informed of the divorce (*j*). As the divorce becomes effective for purposes of dower only when communicated to the wife, limitation under Art. 104 for the wife’s suit for deferred dower runs from the time when the divorce comes to her notice (*k*).

*Hedaya*, 76; *Baillie*, 213, 229, 233.

*Words of divorce*.—The words of divorce must indicate an intention to dissolve the marriage. If they are express (*saheeh*), e.g., “Thou art divorced,” “I have divorced thee,” or “I divorce my wife for ever and render her haram for me” (*Rashid Ahmad v. Anisa Khatun* (1932) 59 I.A. 21), they clearly indicate an intention to dissolve the marriage and no proof of intention is necessary. But if they are ambiguous (*kinayat*), e.g., “Thou art my cousin, the daughter of my uncle, if thou goest” (*Hamid Ali v. Imtiazan* (1878) 2 All. 71) or “I give up all relations and would have no connection of any sort with you” (*Wajid Ali v. Jafar Husain* (1932) 7 Luck. 430, 136 I.C. 209, (’32) A.O. 34), the intention must be proved.

(2) *Talak in writing*.—A talaknama may only be the record of the fact of an oral talak (*l*); or it may be the deed

- (d) *Ma Mi v. Kallander Ammal*, *supra*; *Asha Bibi v. Kadir* (1909) 33 Mad. 22, 8 I.O. 730; *Wahid Khan v. Zainab Bibi* (1914) 36 All. 458, 25 I.O. 887; *Ibrahim v. Syed Bibi* (1888) 12 Mad. 68.  
(e) *Ma Mi v. Kallander Ammal*, *supra*; *Ahmad Kuran v. Khatoon Bibi* (1932) 59 Cal. 838, 141 I.O. 689, (’32) A.O. 27; *Fulchand v. Nazib Ali* (1909) 38 Cal. 164, 1 I.O. 740; *Sarabas v. Kabiadas* (1905) 80 Bom. 535 (obiter).

- (f) *Furzund Hussein v. Janu Bibes* (1878) 4 Cal. 588.  
(g) *Rashid Ahmad v. Anisa Khatoon* (1932) 59 I.A. 21, 54 All. 46, 135 I.O. 762, (’32) A.P.O. 25.  
(h) *Asha Bibi v. Kadir*, *supra*.  
(i) *Fulchand v. Nazib Ali*, *supra*.  
(j) *Ma Mi v. Kallander Ammal*, *supra*.  
(k) *Kathayumma v. Uruthei Marakkur* (1931) 188 I.O. 876, (’31) A.M. 647.  
(l) *See Rashid Ahmad v. Anisa Khatun*, *supra*.

by which the divorce is effected. The deed may be executed in the presence of the kazi (*m*) or of the wife's father (*n*) or of other witnesses (*o*). The deed is said to be in the customary form if it is properly superscribed and addressed so as to show the name of the writer and the person addressed. If it is not so superscribed and addressed it is said to be in unusual form. If it is in customary form it is called "manifest" provided that it can be easily read and comprehended. If the deed is in customary form and manifest the intention to divorce is presumed. Otherwise the intention to divorce must be proved. In the undernoted cases (*p*) the talaknamas were held to be customary and manifest and so operative without proof of intention. On the other hand if the deed is in the form of a declaration not addressed to the wife or any other person, it is not in customary form and is not effective if there was no intention to divorce (*q*). If the talaknama is customary and manifest it takes effect immediately (s. 232) even though it has not been brought to the knowledge of the wife (*r*). In a Bombay case the talaknama was communicated to the wife within a reasonable time and the Court observed that this was sufficient (*s*). This, however, was not a finding that communication within a reasonable time is necessary and the talaknama operated from the date of execution. But as in the case of an oral talak, communication may be necessary for certain purposes connected with dower, maintenance and her right to pledge her husband's credit for means of subsistence (*t*). If an acknowledgment of divorce is made by the husband, the divorce will be held to take effect at least from the date upon which the acknowledgment is made (*u*).

**Shia law.**—A *talak* under the Shia law must be pronounced orally in the presence of two competent witnesses: Baillie, II, 117. A *talak* communicated in writing is not valid, unless the husband is physically incapable of pronouncing it orally: Baillie, II, 113-114.

(*m*) *Sarabai v. Rabiabai* (1905) 30 Bom. 597.

(*n*) *Waj Bibes . Asmus AH* (1868) 3 W. R. 23.

(*o*) *Rajasahab, In re* (1920) 44 Bom. 44, 54 I.O. 578; 59 Cal. 338, *supra*.

(*p*) *Sarabai v. Rabiabai* 30 Bom. 597, *Mahomed Ishaq v. Mt. Sairan* (1936) 168 I.O. 953, ('38) A.L. 611.

(*q*) *Rasul Bakhsa v. Mt. Bholan* (1932) 13 Lab. 760, 138 I.O. 134, ('32) A.L. 498.

(*r*) *Ahmad Kasim v. Khatoon Bibi* (1932) :

59 Cal. 333, 141 I.O. 689, ('38) A.O. 27; *Rajasahab, In re* (1920) 44 Bom. 44, 54 I.O. 578; *Mahomed Ishaq v. Mt. Sairan* (1936) 168 I.O. 953, ('38) A.L. 611.

(*g*) *Rajasahab, In re, supra*.

(*t*) *Ahmad Kasim v. Khatoon Bibi* (1932) 59 Cal. 333, 141 I.O. 689, ('38) A.O. 27.

(*u*) *Asghat Ullah v. Khatoon-un-nisa* (1939) All. 768, (1939) A.L.J. 804, 184 I.O. 517; ('39) A.A. 592.

**S. 230**      **230. Different modes of talak.**—A *talak* may be effected in any of the following ways:—

(1) *Talak ahsan*.—This consists of a *single* pronouncement of divorce made during a *tuhr* (period between menstruations) followed by abstinence from sexual intercourse for the period of *iddat* (s. 199).

When the marriage has not been consummated, a *talak* in the *ahsan* form may be pronounced even if the wife is in her menstruation.

(2) *Talak hasan*.—This consists of *three* pronouncements made during *successive tuhrs*, no intercourse taking place during any of the three *tuhrs*.

The first pronouncement should be made during a *tuhr*, the second during the next *tuhr*, and the third during the *succeeding tuhr*.

(3) *Talak-ul-bidaat or talak-i-badai*.—This consists of—

- (i) three pronouncements made during a *single tuhr* either in one sentence, *e.g.*, “I divorce thee *thrice*,” or in separate sentences, *e.g.*, “I divorce thee, I divorce thee, I divorce thee” (*v*); or,
- (ii) a *single* pronouncement made during a *tuhr* clearly indicating an intention *irrevocably* to dissolve the marriage (*w*); *e.g.*, “I divorce thee *irrevocably*.”

*Hedaya*, 72, 73, 83; *Baillie*, 206, 207, 226

*Talak-us-sunnat and talak-ul-bidaat*.—The Hanafis recognize two kinds of *talak*, namely, (1) *talak-us-sunnat*, that is, *talak* according to the rules laid down in the *sunnat* (traditions) of the Prophet; and (2) *talak-ul-bidaat*, that is, new or irregular *talak*. *Talak-ul-bidaat* was introduced by the Omeyyade monarchs in the second century of the Mahomedan era. *Talak-us-sunnat* is of two kinds, namely, (1) *ahsan*, that is, most proper, and (2) *hasan*, that is, proper. The *talak-ul-bidaat* or heretical divorce is good in law, though bad in theology, and it is the most common and prevalent mode of divorce in this country (*x*), including Oudh (*y*). In the case of *talak ahsan* and *talak hasan*, the husband has an opportunity of reconsidering his decision, for the *talak* in both these cases does not become absolute until a certain period has elapsed (s. 231), and the husband has the option to revoke it before then. But the *talak-ul-bidaat* becomes irrevocable immediately it is pronounced (s. 231). The essential feature of a *talak-ul-bidaat* is its irrevocability. One of the tests of irrevocability is the repetition *three times* of the formula of divorce *within one tuhr*. But the triple repetition is not a necessary condition of *talak-ul-bidaat*, and the intention to render a *talak* irrevocable may be expressed even by a *single* declaration. Thus if a man says: “I have divorced you by a *talak-ul-ban* (irrevo-

(v) *In re Abdul Ali* (1888) 7 Bom. 180;

*Amir-ud-din v. Khatun Bibi* (1917) 39 All. 371, 375, 39 I.O. 513.

(w) *Sarabai v. Rabubai* (1905) 30 Bom.

587; *Sheikh Fazlur v. Musammat Aisha* (1929) 8 Pat. 690, 115 I.O.

546, ('29) A.P. 81.

(x) *Amir-ud-din v. Khatun Bibi* (1917) 39 All. 371, 375, 39 I.O. 513.

(y) *Sheikh Fazlur v. Musammat Aisha* (1929) 8 Pat. 690, 115 I.O. 546, ('29) A.P. 81.

able divorce)," the *talak* is *talak-ul-bidaat* or *talak-i-bada'i* and it will take effect immediately it is pronounced, though it may be pronounced but once. Here the use of the expression "*bain* (irrevocable)" manifests of itself the intention to effect an irrevocable divorce.

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*Talak-ul-bidaat and tuhr.*—The High Court of Patna has expressed the opinion, relying on a passage on p. 74 of the *Hedaya*, that a *talak-ul-bidaat* effected by a triple pronouncement is valid even if it is pronounced when the wife is in her menstruation (x).

**Shia law.**—The Shia lawyers do not recognize the validity of *talak-ul-bidaat*. Baillie, II, 118.

**231. When talak becomes irrevocable.**—(1) A *talak* in the *ahsan* mode [s. 230 (1)] becomes irrevocable and complete on the expiration of the period of *iddat* (s. 199).

(2) A *talak* in the *hasan* mode [s. 230 (2)] becomes irrevocable and complete on the third pronouncement, irrespective of the *iddat*.

(3) A *talak* in the *badai* mode [s. 230 (3)] becomes irrevocable immediately it is pronounced, irrespective of the *iddat* (a). As the *talak* becomes irrevocable at once, it is called *talak-i-bain*, that is, irrevocable *talak*.

*Hedaya*, 72-73; Baillie, 206-207, 226.

Until a *talak* becomes irrevocable, the husband has the option to revoke it which may be done either expressly, or implied as by resuming sexual intercourse.

*Hedaya*, 103 104; Baillie, 287-288

As to the right to contract another marriage after divorce, see sec. 243 (1) As to remarriage of divorced couples, see sec. 243 (5).

**232. When talak in writing becomes irrevocable.**—In the absence of words showing a different intention, a divorce in writing operates as an irrevocable divorce (*talak-i-bain*), and takes effect immediately on its execution (b).

Baillie, 234

In a Bombay case (c), a Hanafi Mahomedan appeared before the Kazi of Bombay and executed a *talaknama*, which ran as follows: "As on account of some disagreement between us there has arisen some ill-feeling, I, the declarant, appear personally before the Kazi of my free will, and divorce Sarabai, my wife by *nika*, by one *bain-talak* (irrevocable divorce), and renounce her from the state of being my wife." In the course of his judgment, Batchelor, J., said: "To my mind this *talaknama* is decisive; it describes the divorce as *talak-ul-bain* and emphatically declares that all rights and liabilities between Adam and plain-

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| <p>(a) <i>Sheikh Fazlur v. Musammat Aisha</i> (1929) 8 Pat. 690, 115 I.C. 546, (29) A.P. 81.</p> <p>(a) <i>Rashid Ahmad v. Anisa Khatun</i> (1932) 59 I.A. 21, 27, 54 All. 46, 52, 135 I.C. 762, (32) A.P.O. 26.</p> | <p>(b) Baillie, 233; <i>Sarabai v. Rabiabai</i> (1905) 30 Bom. 537; <i>M. Hayat Khatun v. Abdullah Khan</i> (37) A.L. 270.</p> <p>(c) (1905) 30 Bom. 537, 546, <i>supra</i>.</p> |
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tiff as husband and wife have ceased and determined. There is ample authority in the books for the view that such a writing, even though not communicated to the wife, effects an irrevocable (that is merely the English rendering of *bain*) divorce *as from the date of the document*." The deed was not in customary form because it was not addressed to the wife (s. 229A.A.), but the learned Judge appears to have thought it was, because it was in a form in common use. The question of intention was however immaterial as the intention to divorce appeared from the facts of the case (*d*).

But the writing may show an intention to the contrary. Thus if the writing says "when this my letter reaches thee, then thou art repudiated," the *talak* does not take effect until the actual receipt of the letter: Baillie, 234. Similarly, if the writing says, "I have divorced thee on the 15th September 1913, and the period of the third divorce will expire on the 15th November 1913," the *talak* contemplated by the husband is a *talak hasan* [s. 230 (2)], and there is no divorce unless two more pronouncements are made (*e*).

**233. Stipulation by wife for right of divorce.**—An agreement made, whether before or after marriage, by which it is provided that the wife should be at liberty to divorce herself in specified contingencies is valid, if the conditions are of a reasonable nature and are not opposed to the policy of the Mahomedan law. When such an agreement is made, the wife may, at any time after the happening of any of the contingencies, repudiate herself in the exercise of the power, and a divorce will then take effect to the same extent as if a *talak* had been pronounced by the husband (*f*). The power so delegated to the wife is not revocable, and she may exercise it even after the institution of a suit against her for restitution of conjugal rights (*g*).

Baillie, 19.

[(a) *A* enters into an agreement before his marriage with *B*, by which it is provided that *A* should pay *B* Rs. 400 for her dower on demand, that he should not beat or ill-treat her, that he should allow *B* to be taken to her father's house four times a year, and that if he committed a breach of any of the conditions, *B* should have the power of divorcing herself from *A*. Some time after the marriage *B* divorces herself from *A*, alleging cruelty and non payment of dower. *A* then sues *B* for restitution of conjugal rights. Here the conditions are all of a reasonable nature, and they are not opposed to the policy of the Mahomedan law. The divorce is therefore valid, and *A* is not entitled to restitution of conjugal rights: *Hamidoolla v. Fatunnessa* (1882) 8 Cal. 327.]

*Talak by tafweez (delegation of power).*—The agreement in the above case may be supported on the doctrine of *tafwecz*, which is an essential part of the

(d) See the criticism in *Rusul Baksh v. Mt. Bholan* (1932) 18 Lah. 780, 138 I.O. 134, ('32) A.L. 493.  
(e) *Ghuulam Mohy-ud-din v. Khizar Hussain* (1928) 10 Lah. 470, 114 I.O. 74, ('29) A.L. 6.  
(f) *Hamidoolla v. Fatunnessa* (1882) 8 Cal. 327; *Ayatunnessa Beebe v. Karam Ali* (1909) 36 Cal. 28; *Maharam Ali v. Ayasa Khattum*

(1915) 19 Cal. W.N. 1226, 31 I.O. 562, *Sainuddin v. Latifunnessa Bibi* (1919) 46 Cal. 141, 48 I.O. 609 [agreement after marriage]: *Mahomed Yasin v. Mumtaz Begum* (1936) 151 I.O. 701, ('36) A.L. 716.  
(g) (1919) 46 Cal. 141, 48 I.O. 609, *supra*

Mahomedan law of divorce. Under that law the husband may *in person* repudiate his wife, or he may *delegate* the power of repudiating her to a third party, or even to the wife: Baillie, 238; such a delegation of power is called *tafweez*. "When a man has said to his wife 'Repudiate thyself,' she can repudiate herself at the meeting, and he cannot divest her of the power". Baillie, 254. "When a man has said to his wife, 'Choose thyself to-day,' or 'this month,' or 'month' or 'year,' she may exercise the option (of repudiation) at any time within the given period": Baillie, 242. The agreement in the case cited in *ill.* (a) may be regarded as a case of repudiation by the wife under an authority from the husband, in other words, as a *talak* by *tafweez*. Such a divorce, though it is *in form* a divorce of the husband by the wife, operates *in law* as a *talak* of the wife by the husband.

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[(b) An agreement between husband and wife by which the husband authorizes the wife to divorce herself from him in the event of his marrying a second wife without her consent is valid: *Maharam Ali v. Ayesa Khatun* (1915) 19 Cal. W. N. 1226, 31 I.C. 562; *Sadiya Begum v. Alta Ullah* (1933) 144 I.C. 497, ('33) A.L. 885; *Badarannissa v. Majlatala* (1871) 7 Beng. L. R. 442. A single judge of the Calcutta High Court has held that such an agreement may be arrived at by their guardians where the parties to the marriage are minors (h).]

*At any time after the happening of the contingency.*—Where a power is given to a wife by the marriage contract to divorce herself on her husband marrying again, then if her husband does marry again, she is not bound to exercise her option at the very first moment she hears the news. The wrong done to her is a continuing one, and she has a continuing right to exercise the power (v).

**234. Talak under compulsion.**—If the words of divorce used by the husband are "express" (s. 229), the divorce is valid even if it was pronounced under compulsion (j), or in a state of voluntary intoxication, or to satisfy his father or some one else (k).

*Hedayat*, 75, 76; Baillie, 208-210.

**Shia law.**—A divorce pronounced in the circumstances stated in this section is invalid under the Shia law: Baillie, II, 108.

**234A. Talak when marriage solemnized in England according to English law.**—A civil marriage, solemnized at a Registrar's office in London between a Mahomedan domiciled in India and an English woman domiciled in England, cannot be dissolved by the husband handing to the wife a *talaknama* [writing of divorce (s. 232)], although that would be an appropriate mode of effecting the dissolution of a Mahomedan marriage under Mahomedan law (l).

The reason is that such a marriage is a Christian marriage by which is meant the voluntary union for life of one man and one woman to the exclusion

(h) *Majlatala Mirja v. Jabedannessa Bibi* (1941) 1 Cal. 401, 45 C.W.N. 910, 197 I.O. 826, ('41) A.O. 657.  
(i) *Ayatunnessa Beedee v. Karam Ali* (1909) 36 Cal. 25, 1 I.C. 518.  
(j) *Ibrahim v. Enayetur* (1869) 4 Beng. L.R. A.O. 18.

(k) *Rashid Ahmad v. Aniea Khatun* (1932) 59 I.A. 21, 27, 54 All. 46, 52-58, 185 I.O. 762, ('32) A.P.C. 25.  
(l) *Re v. Hammermith*, Superintendent Registrar of Marriages [1917] 1 K.B. 654.

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**234A-235** of all others; it is not a marriage in the Mahomedan sense which can be dissolved in Mahomedan manner. A Mahomedan marriage, being a polygamous marriage, is not, for certain purposes of English law, regarded as a marriage. But this reason ceases to apply when the wife becomes a convert to Islam. The Bombay High Court has held that a civil marriage in Scotland between a Christian woman subsequently converted to Mahomedanism and a Mahomedan domiciled in British India can be dissolved by *talak*. This is on the ground that the rights and liabilities arising out of the marriage contract are governed by the *lex domicilii* (*m*).

**234B. Ila.**—Divorce by *Ila* is a species of constructive divorce which is effected by abstinence from sexual intercourse for the period of not less than four months pursuant to a vow. According to Shafe'i law, the fulfilment of such a vow does not per se operate as a divorce, but gives the wife the right to demand a judicial divorce.

Baillie, 296-304; *Hedaya*, 109. See the opening passages of Sura XXXIII and Sura LVIII of the Koran and Sale's notes thereon in his translation.

**234C. Zihar.**—*Zihar* is a form of inchoate divorce. If the husband compares his wife to his mother or any other female within prohibited degrees the wife has a right to refuse herself to him until he has performed penance. In default of expiation by penance the wife has the right to apply for a judicial divorce. Cases of *zihar* are unknown in India and it has been doubted by text book writers whether the wife's rights under *zihar* would be enforced by Courts in British India. But the law of *zihar* has now received statutory recognition in sec. 2 of the Shariat Act, 1937.

*Hedaya*, 117 & 602; Bailhe, Book III, chap. 9.

**235. Khula and mubara'at.**—(1) A marriage may be dissolved not only by *talak*, which is the arbitrary act of the husband, but also by agreement between the husband and wife. A dissolution of marriage by agreement may take the form of *khula* or *mubara'at*.

(2) "A divorce by *khoola* is a divorce with the consent, and at the instance of the wife, in which she gives or agrees to give a consideration to the husband for her release from the marriage tie. In such a case the terms of the bargain are matters of arrangement between the husband and wife, and the wife may, as the consideration, release her *dyn-mohr* (dower) and other rights, or make any other agreement for

(*m*) *Khambatta v. Khambatta* (1935) 59 Bom. 278, 36 Bom. L. R. 1021, 154 I. C. 1075, ('35) A. B. 5 affirming 36 Bom. L. R. 11, 149 I. C. 1232, ('34) A. B. 93. Cf. *Hyde*

*v. Hyde* (1866) 1 P. & D. 130 and *In re Bethell* (1886) 38 O. D. 220 and *Nachanson v. Nachanson* (1930) F. 85 & 217.

the benefit of the husband" (n). Failure on the part of the wife to pay the consideration for the divorce does not invalidate the divorce (o), though the husband may sue the wife for it.

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A *khula* divorce is effected by an offer from the wife to compensate the husband if he releases her from his marital rights, and acceptance by the husband of the offer. Once the offer is accepted, it operates as a single irrevocable divorce (*talak-i-bain*) [ss. 230 (3), 231], and its operation is not postponed until execution of the *khulanama* (deed of *khula*) (p).

(3) A *mubara'at* divorce, like *khula*, is a dissolution of marriage by agreement, but there is a difference between the origin of the two. When the aversion is on the side of the wife, and she desires a separation, the transaction is called *khula*. When the aversion is mutual, and both the sides desire a separation, the transaction is called *mubara'at*. The offer in a *mubara'at* divorce may proceed from the wife, or it may proceed from the husband, but once it is accepted, the dissolution is complete, and it operates as a *talak-i-bain* as in the case of *khula*.

(4) As in *talak*, so in *khula* and *mubara'at*, the wife is bound to observe the *iddat*, as stated in sec. 199 above (q).

*Hedaya*, 112-116; *Baillie*, 305-308. "*Khoola* means to put off, as a man is said to *khoola* his garment when he puts it off. In law it is the laying down by a husband of his right and authority over his wife for an exchange," *Baillie*, 306; *Hedaya*, 112. *Mubara'at* means mutual release: *Baillie*, 306; *Hedaya*, 115.

**236. Effect of *khula* and *mubara'at* divorce.**—Unless it is otherwise provided by the contract, a divorce effected by *khula* or *mubara'at* operates as a release by the wife of her dower, but it does not affect the liability of the husband to maintain her during her *iddat*, or to maintain his children by her.

*Baillie*, 306-307; *Hedaya*, 116.

**237. Apostasy from Islam.**—(1) Before the dissolution of Muslim Marriages Act, 1939, apostasy from Islam of either party to a marriage operated as a complete and immediate dissolution of the marriage (r).

(n) *Moonessee Buzul-ul-Rahem v Luteef-oom-Nussa* (1861) 8 M.I.A. 379, 395; *Saddan v. Faiz Baksh* (1920) 1 Lah. 402, 55 I.O. 184.

(o) (1861) 8 M.I.A. 379, 397-398, *supra*.

(p) (1861) 8 M.I.A. 379, 396, *supra*.

(q) *Ibid*.

(r) *Amin Beg v Saman* (1910) 33 All.

90, 7 I.O. 342; *Mt. Sardaran v. Allah Baksh* ('34) A.L. 976; *Sardar Mohammad v Mt. Maryam Bibi* (1936) 165 I.O. 383, ('86) A.L. 666; *Iqbal Ali v Mt. Hatma* (1939) All. 296, (1939) A.L.J. 65; *Resham Bibi v. Khuda Baksha* (1938) Lah. 277, 40 P.L.R. 722, ('38) A.L. 482.



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(2) Under sec. 4 of the Dissolution of Muslim Marriages Act, 1939, however, mere renunciation of Islam by a married woman or her conversion to any other religion cannot by itself operate to dissolve her marriage but she may sue for dissolution on any of the grounds mentioned in sec. 2 of the Act. Under this Act, therefore, the decisions mentioned below (r) are no longer good law (s).

(3) Sec. 4 only applies to the case of apostasy from Islam of a married Muslim woman, and apostasy of the Muslim husband would still operate as a complete and immediate dissolution of the marriage (r).

(4) The provisions of sec. 4, however, do not apply to a woman converted to Islam from some other faith, who re-embraces her former faith (t). In such a case, the law as it stood before the Dissolution of Muslim Marriages Act, 1939, will apply, and the conversion will operate as a dissolution of the marriage (r).

(5) Apostasy from Islam of the husband operates as a complete and immediate dissolution of the marriage (r).

A Mahomedan husband becomes a convert to Christianity. The wife then marries another man *before* the expiration of the period of *iddat* (s. 199). Is she guilty of bigamy under sec. 494 of the Indian Penal Code? No, because apostasy operates as an *immediate* dissolution of marriage (u). As to conversion to Mahomedanism, see sec. 14 above.

*Rights of inheritance not affected by apostasy.*—Change of religion does not affect rights of inheritance or other rights: see Act XXI of 1850.

**238. Agreement for future separation.**—The High Court of Bombay has held that an agreement between a Mahomedan husband and wife which provides for *future* separation in the event of disagreement between them is void as being against public policy (v). See secs. 215A and 216 (3).

The Bombay decision was founded on sec. 23 of the Indian Contract Act, 1872, which says that an agreement against public policy is void. But this decision is of doubtful authority. If a Mahomedan wife can lawfully stipulate for a divorce as stated in sec. 233, there is no reason why she cannot stipulate for *future* separation, at all events if the separation is to be for a justifiable cause. Such a stipulation can hardly be said to be against the policy of the Mahomedan law

(s) Sec. 4 and first proviso, Dissolution of Muslim Marriages Act, 1939

(t) Sec. 4, proviso 2, Dissolution of Muslim Marriages Act, 1939

(u) *Abdul Ghani v. Asad Hussain* (1912) 39 Cal. 409, 14 I.O. 641; *Karan*

*Singh v. Emperor* (1933) All.L.J. 733, 145 I.O. 150, ('33) A. A. 435.

(v) *Bai Fatma v. Alimohamed* (1918) 37 Bom. 250, 17 I.O. 946.

*B.—Judicial divorce at suit of wife.*

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**238A.** The Dissolution of Muslim Marriages Act, VIII of 1939.—The Dissolution of Muslim Marriages Act was passed in order to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie. The Act came into force on the 17th March, 1939, and lays down the following grounds of divorce:—(1) the whereabouts of the husband are unknown for a period of four years (see sec. 238B); (2) failure of the husband to provide for the maintenance of the wife for a period of two years (see sec. 238C); (3) sentence of imprisonment on husband for a period of seven years (see sec. 238D); (4) failure without reasonable cause to perform marital obligations (see sec. 238E); (5) impotence of husband (see sec. 239); (6) insanity of husband (see sec. 239A); (7) repudiation of marriage by wife (see sec. 239B and sec. 209A); (8) cruelty of husband (see sec. 239C); and (9) any other grounds recognized by Muslim law (see sec. 239D). Section 4 of the Act deals with the effect of the apostasy from Islam of a married Muslim woman (see sec. 237). It is submitted that the grounds are independent of each other, and on proof of any one of them, a decree for dissolution of marriage can be made.

According to the preamble of the Act, it is a consolidating Act. In one case (w), it has been assumed that the Act is a declaratory one, but this at most would apply to sec. 2 of the Act. But even as to sec. 2, it is submitted that the Act is not wholly declaratory. The statement of objects and reasons for the Bill shows that there is no provision in the Hanafi Law enabling a married Muslim woman to obtain a decree dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving her unprovided for and "under other circumstances". "The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India." It is further stated that the Courts hesitate to apply the Maliki Law (which provides for dissolution in such circumstances), although the Hanafi jurists have clearly laid down that in cases of hardship under the Hanafi Law the principle of the Maliki Law may be applied.

Whatever the position may be in cases dealt with in sec. 2, there can be no doubt that the principle of a marriage being dissolved on account of the apostasy of a married woman has not been unknown to the Muslim jurists (x) and this principle has been recognized and given effect to by the decisions of the Courts for more than 70 years. Although, therefore, the preamble states

(w) *Fazal Begum v. Hakim Ali* ('41) A. L. 22.

(x) *Baillie Digest of Shia law*, p. 29; *Hedayah* (Grady) p. 66; *Tagore Lectures*, Vol. 11, p. 347; *Mt. Ra-*

*shid Bibi v. Tufail Muhammad* ('41) A.L. 291; *Wilson's Digest* referred to in *Mt. Rahman Bibi v. Gulam Ali* ('41) A.L. 292.

**Ss. 238A, 238B.** that sec. 4 was enacted "to remove doubts as to the effect of renunciation of Islam by a married Muslim woman on her marriage tie," the section effects a material alteration in the law on the point and can hardly be described as declaratory in its nature.

The question then is whether the Act can be said to be retrospective in its operation. This question arose in three cases decided by the Lahore High Court since the Act came into force and were, curiously enough, cases decided by single judges of the same Court under sec. 4 of the Act. In the first of these cases (y) a wife sued for a declaration that her marriage with the defendant had come to an end on account of her conversion to Christianity. The suit was instituted on the 31st August, 1938, and decreed by the trial Court on the 28th November, 1938. The first appellate Court reversed the decision on the 28th June, 1939, and dismissed the suit. In the meantime Act VIII of 1939 came into force on the 17th March, 1939. The High Court in second appeal confirmed the decision but on the ground that the case was governed by the Act which operated retrospectively. In the later two cases, it was held that the Act could not be applied retrospectively (z). In *Mt. Rashid Bibi v. Tufail Muhammad*, the Court seems to have held that the statute as regards sec. 4 at least was not declaratory and that the law on the point was before the Act different. In both the later decisions it was pointed out that the language used by the Legislature, namely, "the renunciation of Islam . . . shall not by itself operate to dissolve her marriage" would appear to apply only to renunciations or conversions which might take place after the Act came into force.

It is a general principle that no statute shall be construed so as to have a retrospective operation unless its language is such as plainly to require that construction. Except in special cases, a new Act ought to be construed so as to interfere as little as possible with vested rights, and where the words admit of another construction, they should not be so construed as to impose disabilities not existing at the passing of the Act. What the consequences of giving a retrospective effect to sec. 4 would be it is easy to imagine and is pointed out in the cases noted below (z). It is submitted that the language used in sec. 4 is clear and suggests that it was not intended to interfere with rights acquired under the existing law. It is therefore submitted that the decision in *Fazal Begum v. Hakim Ali* is wrong and the view taken in the two later cases (z) is correct.

The learned judge who decided *Rabian Bibi v. Gulam Ali* (z) has held that the provisions of sec. 2 (ii) may be given retrospective effect (a).

In a suit by a Mahomedan girl claiming to exercise her option for a declaration that her marriage with the defendant stood repudiated and dissolved, it was held that although the suit was not filed under Act III of 1939, "the Act must be taken to indicate the general principles of justice, equity and good conscience applicable" and as Mahomedan Law is administered in Sind as a matter of justice, equity and good conscience, there was no reason why the plaintiff should be required to file a fresh suit and therefore the declaration sought was granted (b).

**238B. Absence of husband.**—The wife is entitled to obtain a decree for the dissolution of her marriage if the whereabouts of the husband have not been known for a period of four

(y) *Fazal Begum v. Hakim Ali* ('41) A. L. 22.

(z) *Rashid Bibi v. Tufail Muhammad* ('41) A. L. 291; *Rabian Bibi v. Gulam Ali* ('41) A. L. 292.

(a) *Manak Khan v. Mt. Mulkan Bano* ('41) A. L. 167.

(b) *Zubaida Begum v. Fazir Mahomed* ('40) A. S. 145 (decision of a single judge).

years; but a decree passed on this ground will not take effect Ch. XVI, for a period of six months from the date of such decree, and Ss. 238B, if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court must set aside the decree (c). In such a suit 238C

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit.

The paternal uncle and brother of the husband, if any, must be cited as party even if he or they are not heirs (d).

**238C. Failure to provide maintenance.**—The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has neglected or has failed to provide for her maintenance for a period of two years (e).

*Failure to maintain.*—Failure to maintain the wife need not be wilful. Even if the failure to provide for her maintenance is due to poverty, failing health, loss of work, imprisonment or to any other cause, the wife would be entitled to divorce. Mere inability of the husband to maintain his wife is no longer a ground for refusing a divorce (f) unless, it is submitted, her conduct has been such as to disentitle her to maintenance under the Mahomedan Law. In a recent decision it was held by the Chief Court of Sind that the Act was not intended to abrogate the general law applicable to Mahomedans, and “the husband cannot be said to have neglected or failed to provide maintenance for his wife unless under the general Mahomedan Law he was under an obligation to maintain her”. The wife’s suit for divorce was dismissed as it was found that she was neither faithful nor obedient to her husband (f1).

In the undermentioned case (g) the plaintiff brought a suit for dissolution of her marriage with the defendant on the grounds mentioned in sec. 2 (ii), 2 (viii) (a) and (f). The facts as to the first of these grounds were that since her marriage in 1925 the plaintiff lived with the defendant for about a month and then left him on account of continued ill-treatment. A reconciliation between the husband and the wife was effected as the result of which the plaintiff went back to the defendant but had to leave him again after a few days, since when she lived with her father. In 1928 she fled a suit for maintenance in which it was held that the defendant had neglected to maintain her and a decree against him was passed but no past maintenance was allowed. In 1936 the plaintiff applied to a Magistrate for an order against the

(c) Sec. 2 (i) read with proviso (b) of the Dissolution of Muslim Marriages Act, 1939.

(d) Sec. 3, Dissolution of Muslim Marriages Act, 1939.

(e) Sec. 2 (ii), Dissolution of Muslim

Marriages Act, 1939.

(f) *Manak Khan v. Mt. Mul Khan* (‘41) A.L. 187.

(f1) *Mt. Khatijan v. Abdulla* (1942) Kar. 585, (‘43) A.S. 65.

(g) *Asanabai v. Umer* (‘41) A.S. 23.

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defendant for payment of a monthly allowance under sec. 488 of the Criminal Procedure Code. The Magistrate held that the defendant had neglected to maintain her for many years and she had sufficient grounds for refusing to live with him and passed an order against the defendant for payment of Rs. 10 per month by way of a monthly allowance. Thereafter payments were made by the defendant to the plaintiff, though irregularly and sometimes only after the issue of distress warrants. It was held by a single judge of the Chief Court of Sind that although it could not be said that during the two years immediately preceding the suit the defendant had not maintained the plaintiff, "in the circumstances of the case" the plaintiff was not debarred from relying on sec. 2 (ii) of the Act, in respect of the earlier period of 10 years as a good ground for the dissolution of her marriage. It is submitted that the decision is not correct.

*Maintenance.*—According to Mahomedan Law maintenance signifies all those things which are necessary to the support of life, such as food, clothes and lodging. *Hedaya*, 392.

**238D. Imprisonment of husband.**—The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has been sentenced to imprisonment for a period of seven years or upwards, but no decree can be passed on this ground until the sentence has become final (*h*).

**238E. Failure to perform marital obligations.**—The wife is entitled to obtain a decree for the dissolution of her marriage if the husband has failed to perform without reasonable cause his marital obligations for a period of three years (*i*).

**239. Impotence of husband.**—The wife is entitled to obtain a decree for the dissolution of her marriage if the husband was impotent at the time of the marriage and continues to be so; but before passing a decree on this ground the Court is bound, on application by the husband, to make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree can be passed on the ground of his impotence (*j*).

*Alteration in the law.*—The Act has altered the law and procedure applicable to suits for dissolution of marriage on the ground of the husband's impotency in the following respects: (1) It is no longer necessary for the wife to prove that she did not know of her husband's impotency at the time of the marriage. (2) It is no longer necessary for the Court to adjourn the suit for one year in order to ascertain if the husband has ceased to be impotent, unless the husband applies for an order to that effect. If no such application is made by the husband after the wife has proved that the husband was impotent at the time of the marriage and continued to be so, then the Court must pass a

(A) Sec. 2 (iii) re  
Dissolution of  
Act, 1939.

(C) Sec. 2 (iv), Dissolution of Muslim

Marriages Act, 1939.  
(J) Sec. 2 (v) read with proviso (a),  
Dissolution of Muslim Marriages Act,  
1939.

decree for dissolution forthwith. (3) It is no longer necessary for the wife to prove after the year of probation that the husband is still impotent. Under the Act it is for the husband to prove within the period of one year that he has ceased to be impotent. The potency, of course, must be in regard to his wife (k).

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The earlier decisions (l) on these points which were relied upon in the last edition are no longer good law.

**239A. Insanity of husband.**—The wife may obtain a decree for the dissolution of her marriage if the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease (m).

**239B. Repudiation of marriage by wife.**—See section 209A.

**239C. Cruelty of husband.**—The wife is entitled to a decree for the dissolution of her marriage if the husband treats her with cruelty, that is to say,

(a) habitually assaults her or makes her life miserable by cruelty or conduct even if such conduct does not amount to physical ill-treatment, or

Even before the Act cruelty was considered a sufficient ground for granting divorce (n) but incompatibility of character was not (o).

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran (p).

The opinion has been expressed by the Chief Court of Sind that only a very gross failure to render to a wife her just rights could be considered in a Court of law as a ground for dissolution (q).

(k) *Muhammad Ibrahim v. Alfafan* (1925) 47 All. 243, 83 I.O. 27, ('25) A. A. 24.

(l) *Muhammad Ibrahim v. Alfafan*, (1925) 47 All. 243, 83 I.O. 27, ('25) A. A. 24; *A. v. B.* (1896) 21 Bom. 77; *Fadake Vith v. Odake* (1881) 8 Mad. 847; *Mt. Fatima v. Jalal Din* (1936) 108 I.O. 751, ('36) A.L. 501; *Badar Din v. Mt. Allah*

*Rakhi* ('87) A.L. 883.

(m) Sec. 2 (vi), Dissolution of Muslim Marriage Act, 1939.

(n) *Kadir v. Kolenan Bibi* (1935) 62 Cal. 1088, 163 I.O. 188.

(o) *Mt. Mustafa v. Mirza Khan* ('83) A. O. 15.

(p) Sec. 2 (viii), Dissolution of Muslim Marriage Act, 1939.

(q) *Amabai v. Umar* ('41) A.B. 23.

8s. 239D. Grounds of dissolution recognised by Mahomedan  
239D, 240 Law.—The wife is entitled to a decree for the dissolution of  
her marriage on any other ground which is recognised as valid  
for the dissolution of marriages under Muslim law (r).

Section 2 of the Shariat Act expressly refers to *tala* (see sec. 234B, *zihar*  
(see sec. 234C), *Khula* and *mubara'at* (see sec. 235). Sub-clause (ix) of  
sec. 2 is sufficiently wide to cover all grounds recognised by the Muslim law  
entitling a wife to divorce including the contractual right of divorce known as  
*talak* by *tafweez* (see sec. 233).

240. *Li'an* or *imprecation*.—(1) The wife is entitled to sue  
for a divorce on the ground that her husband has falsely  
charged her with adultery. She must file a regular suit for  
dissolution of her marriage as a mere application to the  
Court is not the proper procedure (s). If the charge is  
proved to be false, she is entitled to a decree, but not if it is  
proved to be true (t). No such suit will lie if the marriage  
was irregular [Baillie, 337].

(2) *No separation until decree*.—A charge of adultery  
does not of itself terminate the marriage. The marriage con-  
tinues until the decree is passed (u).

(3) *Retraction of charge*.—The effect of the decisions,  
excluding what are merely *obiter dicta*, would appear to be  
that a retraction of the charge by the husband at or before  
the commencement of the hearing disentitles the wife to a  
decree (v), but she is entitled to a decree if the retraction is  
made after the close of the evidence (w), or of the trial (x).  
The High Court of Bombay has expressed the opinion that  
retraction "has no place in the procedure in British  
Courts" (y).

Baillie, 335-339; *Hedaya*, 123-124.

*Li'an* or *imprecation*.—*Li'an* is testimony confirmed by oath and accompa-  
nied with imprecation. Under the pure Mahomedan law, if a man charges his  
wife with adultery, he may be called upon, on the application of the wife,  
either to retract the charge or to confirm it by oath complied with an imprecation in

(r) Sec. 2 (ix) of the Dissolution of Mus-  
lim Marriages Act, 1939.

(s) *Kabil Gazi v. Madari Bibi* (1933) 57  
Cal. L.J. 106, 145 I.O. 828, ('33)  
A.O. 680; *Ayesha Bibi v. Abdul*  
*Gani* (1934) 59 Cal. L.J. 466.

(t) *Zafar Husain v. Ummat-ur-Rahman*  
(1919) 41 All. 278, 49 I.O. 256;  
*Khatijabi v. Umarsahab* (1928) 52  
Bom. 295, 110 I.O. 181, ('28)  
A.B. 285.

(u) *Jauin Beebee v. Beparee* (1865) 8  
W.R. 93; *Khatijabi v. Umarsahab*  
(1928) 52 Bom. 295, 110 I.O. 181,  
(('28) A.B. 285.

(v) *Muhammad Fakhr Jahan v. Muham-*

*mad* (1929) 4 Luck. 168, 114 I.  
O. 814, ('29) A.O. 16.

(w) *Rahima Bibi v. Farid* (1926) 48 All.  
834, 98 I.O. 573, ('27) A.A. 56;  
*Shamsunnessa Khatun v. Mir Ab-*  
*dul Manaf* (1940) 1 Cal. 97, 70  
O.L.J. 289, 186 I.O. 604, ('40)  
A.O. 95.

(x) *Ahmed v. Bai Fatma* (1931) 55  
Bom. 160, 128 I.O. 909, ('31) A.  
B. 76, where the husband asked  
for an opportunity to withdraw the  
charge for the first time in first ap-  
peal.

(y) (1931) 55 Bom. 160, 162, 128 I.O.  
909, ('31) A.B. 76, *supra*.

these terms: "The curse of God be upon him if he was a liar when he cast at her the charge of adultery." The wife must then be called upon either to admit the truth of the imputation, or to deny it on oath coupled with an imprecation in these terms: "The wrath of God be upon me if he be a true speaker in the charge of adultery which he has cast upon me." If she takes the oath, the Kazi must believe her, and pronounce a separation between the parties. These, however, are mere rules of evidence, and they have been superseded by the Indian Evidence Act, 1872. As to special oaths under the Indian Oaths Act, 1873, see secs. 8, 9 and 11 of the Act and the under-mentioned case (s).

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*Where wife has not attained majority.*—A wife who has attained puberty is entitled to sue under this section without a guardian, though she may not have attained majority as defined in the Indian Majority Act, 1875 (a).

As to restitution of conjugal rights where a charge of adultery has been made, see sec. 216 (4).

**241. Judicial divorce on other grounds.**—According to the old authorities the wife was not entitled to a judicial divorce on any other ground such as the conjugal infidelity of the husband or his inability to maintain her (Baillie, 443) or cruelty. But the Calcutta High Court have held that cruelty and desertion are grounds for divorce (b). Incompatibility of temperament is not a ground for divorce (c). Section 5 of the Shariat Act empowers the District Judge to give a divorce on the wife's petition. See sec. 5A, *supra*.

"Under the Mahomedan law a wife has no absolute right to obtain a divorce. She has that right only under certain specific contingencies and conditions" (d). As to cruelty as an answer to the husband's suit for restitution of conjugal rights, see sec. 216 (2).

**242. Wife's costs in proceedings for divorce.**—The rule of English law which makes the husband in divorce proceedings liable *prima facie* for the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans (e).

The English rule is founded upon the doctrine of the Common Law according to which the husband becomes entitled upon marriage to the whole of the wife's personal property and to the income of her real property. Under the Mahomedan law, however, the husband does not by marriage acquire any interest in the property of the wife and there is no reason, therefore, to apply the rule of English law to proceedings for dissolution of marriage between Mahomedans.

(s) *Khatijabi v. Umarsahab* (1928) 52 Bom. 295, 110 I.O. 131, ('28) A. B. 285.

(a) *Ahmed v. Bai Fatma* (1931) 55 Bom. 160, 128 I.O. 909, ('31) A.B. 76.

(b) *Kadir v. Kuleman Bibi* (1935) 62 Cal. 1088, 89 Cal.W.N. 896, 61

Cal.L.J. 342, 163 I.O. 188.

(c) *Mustafa Begum v. Mirza Kaziin Rosa Khan* (1933) 8 Luck. 204, 142 I. O. 46, ('33) A.O. 15.

(d) *Muhammad Ibrahim v. Altafan* (1925) 47 All. 248, 249, 89 I.O. 27, ('25) A.A. 24, 25.

(e) *A. v. B.* (1896) 21 Bom. 77.



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## C.—Effects of divorce.

243. Rights and obligations of parties on divorce.—The following rights and obligations arise on the completion of a divorce, whatever may be the mode of divorce:—

(1) *Right to contract another marriage.*—If the marriage was consummated, the wife may marry another husband after the completion of her *iddat*; if the marriage was not consummated, she is free to marry immediately.

If the marriage was consummated, and the husband had four wives at the date of divorce including the divorced wife, he may marry another wife after completion of the *iddat* of the divorced wife.

*Hedaya*, 128, 32; Baillie, 350-351, 34-35. As to *iddat*, see sec. 199 and notes. As to maintenance during *iddat*, see sec. 215. If the marriage was not consummated, there is no *iddat* of divorce (s. 199)

(2) *Dower becomes immediately payable.*—If the marriage was consummated, the wife is entitled to immediate payment of the whole of the unpaid dower, both prompt and deferred.

If the marriage was not consummated, and the amount of dower was specified in the contract, she is entitled to half that amount (*f*). If no amount was specified all that she is entitled to is a present of three articles of dress.

*Hedaya*, 44 45; Baillie, 96-97.

Where a marriage is dissolved upon the apostasy of the wife, she is entitled to the whole of the dower if the consummation of the marriage has taken place (*g*).

Nothing contained in the Dissolution of Muslim Marriages Act, 1939, affects any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage (*h*).

(3) *Mutual rights of inheritance cease.*—Either party is entitled to inherit from the other until the divorce becomes irrevocable (s. 231).

Immediately the divorce becomes irrevocable, mutual rights of inheritance cease, except where the divorce was pronounced during the husband's death-illness (sec. 114), in

(f) *Tajbi v. Nattar Sherif* (1940) 2 M.L.J. 345, (1940) M.W.N. 864, 191 I.C. 728, (40) A.M. 888.  
(g) *A. M. Md. Ebrahim v. Ma Ma & anr.*

(1939) Rang. 883, 179 I. C. 47, ('39) A.R. 28.  
(h) Sec. 5 of the Dissolution of Muslim Marriages Act, 1939.

which case the *wife's* right to inherit continues until the expiry of her *iddat*, unless she was repudiated at her own request (*i*). Ch. XVI, S. 243

Baillie, 279, 280, 282; *Hedaya*, 99-100.

1. The point of time when the rights of inheritance cease is the point of time when the divorce becomes irrevocable. In a *talak* in the *ahsan* mode that point of time is the expiry of the *iddat* [s. 231 (1)]. In a *talak* in the *hasan* mode, it is the third pronouncement [s. 231 (2)]. In a *talak* in the *badai* mode, it is the moment when the *talak* is pronounced [sec. 231 (3)].

2. It is obvious from what has been stated above that in the case of a *talak* in the *hasan* mode and a *talak* in the *badai* mode (\*), the rights of inheritance cease immediately the *talak* becomes irrevocable, though the death, whether of the husband or wife, may occur before the expiry of the *iddat*. To this, however, there is an exception in favour of the wife. It is this that if the repudiation was made during the husband's death-illness, and he dies before the expiry of the *iddat*, the *wife* is entitled to inherit from him, the reason given being that a repudiation by a man in his last illness is nothing but a device to defeat the wife's right of inheritance. But the husband is not entitled to inherit from his wife if she dies before the expiry of the *iddat*, for he, and not she, was responsible for "the rupture of conjugal rights." These observations do not apply to a *talak* in the *ahsan* mode, for the rights of inheritance in that case continue until the expiry of the *iddat*, and it makes no difference whether the repudiation was made in health or in death-illness.

3. There is no right of inheritance in any case after the expiry of the *iddat*.

(4) *Cohabitation becomes unlawful*.—Sexual intercourse between the divorced couple is unlawful after the divorce has become irrevocable. The offspring of such an intercourse is illegitimate [ill. (a) to sub-sec. (5)], and cannot be legitimated by acknowledgment (*k*) [s. 247]. But the parties may remarry as stated in sub-sec. (5) below.

(5) *Remarriage of divorced couple*.—(i) Where the husband has repudiated his wife by three pronouncements [s. 230 (2) and sec. 230 (3) (i)], it is not lawful for him to marry her again until she has married another man, and the latter has divorced her or died after actual consummation of the marriage. The presumption of marriage arising from an acknowledgment of legitimacy [s. 206A] does not apply to a remarriage between divorced persons unless it is established that the bar to remarriage created by the divorce was removed by proving an intermediate marriage and a subsequent divorce after actual consummation (*l*) [ill. (a)]. Even if a

(i) See *Sarabai v. Rabiabai* (1905) 30 Bom. 537, 547-548.

(j) (1905) 30 Bom. 537, 556-557, *supra*.

(k) *Rashid Ahmad v. Anisa Khatun* (1982) 59 I.A. 21, 27, 28, 54 All.

46, 58-54, 135 I.O. 762, ('82) A. P.O. 20.

(l) *Rashid Ahmad v. Anisa Khatun* (1982) 59 I.A. 21, 27, 28, 54 All. 46, 53-54, 135 I.O. 762, ('82) A.P.O. 25.

**S. 243** remarriage between the divorced persons is proved, the marriage is not valid unless it is established that the bar to remarriage was removed; the mere fact that the parties have remarried does not raise any presumption as to the fulfilment of the above conditions (m) [ill. (b)]. A remarriage without fulfilment of the above conditions is irregular, not void [Baillie, 151].

(ii) In all other cases, the divorced parties may remarry as if there had been no divorce either during the *iddat* or after its completion.

[ (a) A Hanafi Mahomedan repudiates his wife by three pronouncements in the same breath in these terms: " I divorce you, I divorce you. I divorce you " [s. 230 (3) (i)]. The parties afterwards live together, and five children are born to them, whom the father acknowledges as legitimate. After his death the children claim their share of his estate as his heirs. It is not proved that there was a remarriage between the parties but the Court is asked to presume it from the acknowledgment of legitimacy. An acknowledgment of legitimacy, no doubt, raises a presumption of marriage, but that is only when there is no legal bar to the marriage. There is such a bar in this case created by the divorce, and it can only be removed by proving that their mother had after the divorce married another man, and the latter had died or divorced her after actual consummation of the marriage. If these facts are not proved, remarriage cannot be presumed, and the children cannot be held to be legitimate, and their claim must fail: *Eashid Ahmad v. Ansa Khatun* (1932) 59 I.A. 21, 54 All 46, 135 I.C. 762, ('32) A.P.C. 25.

(b) A Hanafi Mahomedan repudiates his wife by three pronouncements made during successive *tuhrs* [s. 230 (2)]. He then marries her again. It is not proved that there was any intermediate marriage, but the Court is asked to presume it from the fact of the remarriage. No such presumption, however, can be drawn from the mere fact of remarriage, and the remarriage is irregular. As to the consequences of an irregular marriage, see sec. 206 above]

(c) A Hanafi Mahomedan divorces his wife by a *talak* in writing executed on the 25th September 1927. Such a divorce takes effect immediately on execution of the deed (s. 232). After the divorce the parties resume cohabitation, but the husband again divorces his wife by oral *talak* on the 30th October 1932. There was no intermediate marriage or remarriage. The resumption of cohabitation did not restore the relationship of husband and wife. The oral divorce was a meaningless formality. The wife's suit for dower instituted more than three years after the 25th September 1927 was time-barred: *Hayat Khatun v. Abdulla Khan* ('37) A.L. 270.

Baillie, 292-293; *Hedaya*, 107-108.

A remarriage with a thrice repudiated wife without fulfilling the conditions mentioned above is irregular, and not void. The reason for it is that the obstacle to the marriage can be removed " by consummation with a second husband, and expiration of her *iddat* ": Baillie, 151.

As to " actual " consummation, see note to sec. 199. " Valid retirement " has not the same effect for this purpose.

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(m) *Akhlaeen-nisa v. Sharintoolah* (1867) 7 W.R. 268.

## CHAPTER XVII.

### PARENTAGE—LEGITIMACY AND ACKNOWLEDGMENT.

#### *A.—Establishment of Parentage.*

**244. Paternity and maternity.**—Parentage is the relation of parents to their children. Paternity is the legal relation between father and child. Maternity is the legal relation between mother and child. These legal relations give rise to certain rights and liabilities as regards inheritance, guardianship, and maintenance. Ch. XVII,  
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**244A. Maternity how established.**—The maternity of a child is established in the woman who gives birth to the child, irrespective of the lawfulness of her connection with the begetter.

Baillie, 391.

As regards maternity, it is immaterial whether the child is an offspring of marriage or an offspring of *zina*, that is, fornication or adultery. The maternity of the child in either case is established in the woman who actually gives birth to the child. But paternity is not established unless the child was the offspring of marriage. Thus if a man commits *zina* with a woman, and a child is born, it is considered to be the child of its mother only and inherits from her and her relations (s. 72). But the man is not considered to be the father of the child, for paternity is established only by marriage, nor is the child *in law* the child of the man; it is *illegitimate*, and not entitled to inherit from him.

**244B. Paternity how established.**—(1) The paternity of a child can only be established by marriage between its parents. The marriage may be valid (*sahih*), or irregular (*fasid*), but it must not be void (*batil*).

Marriage may be established by direct proof. If there be no direct proof, it may be established by indirect proof, that is, by presumption drawn from certain facts. It may be presumed from prolonged cohabitation combined with other circumstances (s. 206A), or from an acknowledgment of legitimacy in favour of a child.

(2) When the paternity of a child is established, its legitimacy is also established.

**Ss.** Baillie, 391, 392, 400-402; Shama Churam Sirkar's Tagore Lectures, 1873, 244B, 245; CCCXV.

The main pivot in cases of paternity and legitimacy is marriage<sup>1</sup>. It is so also in the case of an acknowledgment. This appears clearly from the following passage in the judgment of the Privy Council in *Habibur Rahman v. Altaf Ali* (a):—

"By the Mahomedan law a son to be legitimate must be the offspring of a man and his wife or of a man and his slave; any other offspring is the offspring of *stna*, that is illicit connection, and cannot be legitimate. The term "wife" necessarily connotes marriage; but as marriage may be constituted without any ceremonial, the existence of a marriage in any particular case may be an open question. Direct proof may be available, but if there be no such, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son."

**245. Legitimacy: when conclusively presumed.**—The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten.

This is sec. 112 of the Indian Evidence Act, 1872. The question whether sec. 112 of the Evidence Act supersedes the rules of Mahomedan law as to legitimacy was left open in an Allahabad case (b). The High Court of Allahabad has since held that that the section supersedes Mahomedan law, and that it applies to Mahomedans (c). The same view has been taken in Lahore (d). The Chief Court of Oudh has held that even if sec. 112 applied to Mahomedans, it cannot be applicable to an irregular (*fard*) marriage, as such a marriage is not a "valid" marriage within the meaning of the section. "Valid," in the view of that Court, means "flawless" (e). The marriage in the Oudh case was an irregular marriage, being a marriage with the wife's sister (s. 204).

*Presumption of legitimacy under the Mahomedan law.*—The rules of Mahomedan law may now be stated [Baillie, 392-393, 396-397]. They are as follows:—

1. A child born within less than 6 months after marriage is illegitimate.
2. A child born after 6 months from the date of marriage is presumed to be legitimate, unless the putative father disclaims the child by *li'an* (s. 240).
3. A child born within 2 years after the termination of the marriage is presumed to be legitimate, unless disclaimed by *li'an* (s. 240). This is the rule of Hanafi law. According to the Shafei and Maliki law, the period is 4 years. According to the Shia law, it is 10 months.

(a) (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.O. 837, ('23) A.P.C. 159.

(b) *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 339.

(c) *Sibt Muhammad v. Muhammad* (1926) 48 All. 625, 98 I.O. 582, ('26) A. A. 569; See *Ismail Ahmed Feroz v. Kowin Bibi* (1941) 193 I. O. 209, ('41) A.P.C. 11.

(d) *Mt. Rahim Bibi v. Chiragh Din* ('30) A.L. 97, 120 I.O. 495; *Ghulam Mohy-ud-Din v. Khizar* (1929) 10 Lah. 470, 114 I.C. 74, ('29) A. L. 6.

(e) *Musammal Kaniza v. Hasan* (1926) 1 Luck. 71, 92 I.O. 82, ('26) A. O. 231.

*Points of difference between the two systems:—*

(1) *In contrast with rule 1.*—Under sec. 112 a child born even a day after marriage is legitimate, unless the parents had no access to each other at any time at which it could have been begotten.

(2) A child born after 6 months from the date of marriage, but within 280 days of the termination of the marriage is legitimate under either system, subject to *h'an* in the one case, and proof of non-access in the other.

(3) A child born between 280 days and 2 years after the termination of the marriage is legitimate by the Hanafi law, subject to *h'an*. Under the Evidence Act, however, the case will be governed by sec. 114 which provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events." In a Calcutta case (*f*), before the passing of the Evidence Act, the Court declined to follow this part of the rule of Mahomedan law in the case of a child born 19 months after the date of divorce, on the ground that to hold that such a child was legitimate "would be contrary to the course of nature and impossible."

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**246. Legitimacy presumed from presumptive marriage.**—The legitimacy of a child may be presumed from circumstances from which a marriage itself between its parents may be presumed (s. 206A).

In *Mahomed Barker v. Shurfoon Nissa (g)*, the Privy Council said: "The legitimacy or legitimation of a child of Muhammadan parents may properly be presumed or inferred from circumstances without proof, or at least without any direct proof, either of a marriage between the parents, or of any formal act of legitimation." See to the same effect, *Amcer Ali*, 5th ed., Vol. ii, 213 *seq.* A statement by a deceased father that he was married to the mother is evidence of marriage from which the legitimacy of the child may be presumed (*h*).

*B.—Acknowledgment of paternity.*

**247. Acknowledgment of legitimacy.**—(1) "Where the paternity of a child, that is, his legitimate descent from his father cannot be proved by establishing a marriage between his parents at the time of his conception or birth, the Muhammadan law recognizes 'acknowledgment' as a method whereby such marriage and legitimate descent can be established as a matter of substantive law for purposes of inheritance."

"The Muhammadan law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established, either by reason of a lawful union between the parents of the child being impossible (as in the case of an incestuous intercourse or an adulterous connection), or by reason of marriage necessary to render the child legitimate

(f) *Ashraf Ali v. Ashraf Ali* (1871) 16 W.R. 260.

232, ('86) A.R. 448.  
(h) *Zamin Ali v. Asie-un-nissa* (1933) 55 All. 139, 144 I.C. 433, ('33) A.A.

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being *disproved*. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the 'acknowledged child is *not proved* in the sense of the law as distinguished from *disproved*. In other words, the doctrine applies only to cases of uncertainty as to legitimacy, and in such cases acknowledgment has its effect, but that effect always proceeds upon the assumption of a lawful union between the parents of the 'acknowledged child' (i). In short, the doctrine applies only to cases where either the fact or the exact time of the alleged marriage is a matter of uncertainty, that is, neither *proved* nor *disproved* (j). Stated in another form, the doctrine is "limited to cases of *uncertainty* of legitimate descent, and proceeds entirely upon an assumption of legitimacy and the establishment of such legitimacy by the force of such acknowledgment" (k).

(2) The acknowledged child may be a son or a daughter (l).

Baillie, 406; *Hezlaya*, 439. The doctrine of acknowledgment is not a mere rule of evidence, but is part of the substantive law of inheritance. Hence the conditions under which it will take effect must be determined with reference to Mahomedan Jurisprudence (m).

The leading case on the subject is *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, a case which has been followed by Courts throughout India and approved by the Privy Council. The passages cited in this section are from the judgment of Mahmood, J. The law was thus stated by the Privy Council in *Sadik Husain v. Hashim Ali* (n); "No statement made by one man that another (*proved to be illegitimate*) is his son can make that other legitimate, but where no proof of that kind has been given, such a statement or acknowledgment is substantive evidence that the person so acknowledged is the legitimate son of the person who makes the statement, provided his legitimacy is possible" (s. 250).

**248. Acknowledgment may be express or implied.—**AlI acknowledgment need not be express. It may be presumed

(i) *Muhammad Allahdad v. Muhammad Ismail* (1888) 10 All. 289, 330, 334-335; *Musst. Bibee Farilatunnessa v. Musst. Bibee Kamarunnessa* (1905) 9 O.W.N. 352; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 48 Cal. 556, 60 I.O. 837, ('22) A.P.C. 159 [marriage *disproved*]; *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 38 All. 627, 36 I.O. 104; *Ihsan v. Panna Lal* (1928) 7 Pat. 6, 103 I.O. 430, ('28) A.P. 19; *Muhammad Shaqvilah v. Nuh-ullah* (1926) 48 All. 58, 38 I.O. 954, ('26) A.A. 48; *Agha Muhammad v. Zohra Begum* (1928) 8 Luck. 190, 105 I.O. 490, ('28) A.O. 562; *Firoz Din v. Na-*

*wab Khan* (1926) 9 Lah. 224, 109 I.O. 779, ('28) A.L. 224 [marriage *disproved*]; *Ibrahim v. Mubarak* (1920) 1 Lah. 229, 56 I.O. 823; *Ummatunissa v. Fadi Mahomed* (1916) 40 Bom. 28, 60 I.O. 804; *Mohabbat Ali v. Mahomed Ibrahim* (1929) 56 I.A. 201, 10 Lah. 726, 117 I.O. 17, ('29) A.P.C. 185.

(j) *Muhammad Allahdad v. Mahomed Ismail* (1888) 10 All. 289, 384.

(k) (1888) 10 All. 289, 337, *supra*.

(l) See *Dhan Bibi v. Lalon Bibi* (1900) 27 Cal. 801.

(m) (1888) 10 All. 289, *supra*.

(n) (1916) 43 I.A. 212, 234, 38 All. 627, 661, 36 I.O. 104.

from the fact that one person has habitually and openly treated Ch. XVII, another as his child, that is, as a *legitimate* child (o).

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In *Muhammaḍ Asmat v. Lalli Begum* (p), their Lordships of the Privy Council said: "It has been decided in several cases that there need not be proof of an express acknowledgment, but that an acknowledgment of children by a Mahomedan as his sons may be inferred from his having openly treated them as such."

**249. Conditions of valid acknowledgment.**—In order to render an acknowledgment valid and effective the following conditions must be fulfilled:—

- (1) "the acknowledgment must be not merely of sonship, but must be made in such a way that it shows that the acknowledger meant to accept the other not only as his son, but as his *legitimate* son" (q) [see note 2 below];
- (2) the ages of the parties must be such as to admit of the acknowledger being the father of the person acknowledged (r) [see note 3 below];
- (3) the person acknowledged must not be the offspring of *zina*, that is, adultery, incest or fornication (s), as he would be if his mother could not possibly have been the lawful wife of the acknowledger at any time when he could have been begotten, as where the mother was at that time the wife of another man (t) or had been divorced by the acknowledger and the legal bar to remarriage had not been re-

(o) *Muhammaḍ Asmat v. Lalli Begum* (1881) 9 I.A. 8, 18, 8 Cal. 422, *Khajah Hidayat v. Rai Jan Khanum* (1844) 3 M.I.A. 295, 323 [consecutive course of treatment], *Mahomed Baulker v. Shurfoom Nissa* (1860) 3 M.I.A. 136, 158-159; *Ashrafud Dowlah v. Hyder Hossain Khan* (1866) 11 M. I.A. 94, 110; *Sadakat Hossain v. Mahomed Yusuf* (1888) 10 Cal. 663, 11 I.A. 31; *Abdool Razak v. Aga Mahomed Jaffer* (1893) 21 Cal. 663, 21 I.A. 56; *Hasik-un-nissa v. Fathani* (1904) 26 All. 295; *Musst. Bibee Fuziatunnessa v. Musst. Bibee Komarunnessa* (1905) 9 C. W.N. 352.

(p) (1881) 9 I.A. 8, 18, 8 Cal. 422  
(q) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 120, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159; *Abdool Razack v. Aga Mahomed Jaffer* (1893) 21 Cal. 666, 21 I.A. 56; *Sadakat Hossain v. Mahomed Yusuf* (1888) 10 Cal. 663, 11 I.A. 31.

(r) *Habibur Rahman v. Altaf Ali* (1921)

48 I.A. 114, 120-121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(s) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159; *Sadik Hussain v. Hashim Ali* (1916) 43 I.A. 212, 234, 38 All. 627, 661, 38 I.O. 104; *Rashid Ahmad v. Anisa Khatun* (1922) 59 I.A. 21, 54 All. 46, 135 I.O. 782, ('22) A.P.O. 25; *Muhammaḍ Allahdad v. Muhammaḍ Immaḍ* (1888) 10 All. 289, 334-337; *Mardansahab v. Rajak-sahab* (1909) 34 Bom. 111, 4 I.O. 254; *Agha Muhammad v. Zohra Begum* (1928) 3 Luck. 199, 105 I.O. 490, ('28) A.O. 563; *Muhammaḍ Shaq-ullah v. Nuh-ullah* (1926) 48 All. 58, 88 I.O. 954, ('26) A.A. 48; *Niaz Mahammad v. Yusuf Khan* ('34) A.L. 462, 154 I.O. 738.

(t) *Liaquat Ali v. Karim-un-nissa* (1893) 15 All. 396; *Mardansahab v. Rajak-sahab* (1909) 34 Bom. 111, 4 I.O. 254; *Agha Muhammad v. Zohra Begum* (1928) 3 Luck. 199, 105 I.O. 490, ('28) A.O. 563; *Muhammaḍ Shaq-ullah v. Nuh-ullah* (1926) 48 All. 58, 88 I.O. 954, ('26) A.A. 48; *Niaz Mahammad v. Yusuf Khan* ('34) A.L. 462, 154 I.O. 738.



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moved (u) or was within prohibited degrees of the acknowledger (v). If the marriage is *disproved*, the issue would be the issue of fornication (w) [see note 4 below].

(4) the person acknowledged must not be known to be the child of another man (x).

(5) the acknowledgment must not have been repudiated by the person acknowledged (y) [see note 5 below].

The above conditions apply whether the acknowledged child is a son or a daughter [see s. 247 (2)].

*Hardaya*, 430; *Baillie*, 408. A synopsis of the above conditions will be found in the Privy Council case of *Habibur Rahman v Altaf Ali* (z).

1. *Acknowledgment and burden of proof*.—As marriage among Mahomedans may be constituted without any ceremonial, direct proof of marriage is not always available. Where direct proof is not available, indirect proof may suffice. Now one of the ways of indirect proof is by an acknowledgment of legitimacy in favour of a son. This acknowledgment must be not merely of sonship, but of *legitimate* sonship. Further, it must not be impossible upon the face of it as stated in the present section. If the conditions stated in the section are satisfied, the acknowledgment has more than a mere evidentiary value. "It raises a *presumption of marriage*—a presumption which may be taken advantage of either by a wife-claimant or a son-claimant. Being, however, a presumption of fact, and not *juris et de jure*, it is, like every other presumption of fact, capable of being set aside by contrary proof. The result is that a claimant son who has in his favour a good acknowledgment of legitimacy is in this position: the marriage will be held proved and his legitimacy established unless the marriage is *disproved*. Until the claimant establishes his acknowledgment the onus is on him to prove a marriage. Once he establishes an acknowledgment, the onus is on those who deny a marriage to negative it in fact" (a).

2. *Clause (1): intention to confer status of legitimacy*.—The acknowledgment must be not merely of sonship, but of *legitimate* sonship. It must not, however, be supposed that an acknowledgment merely of sonship has no evidentiary value. Acknowledgment as a son *prima facie* means acknowledgment as a legitimate son (b).

A mere casual acknowledgment of paternity, not intended to confer the status of legitimacy, will not have the effect of conferring that status. There must be an intention to confer that status (c).

(u) *Kashid Ahmad v. Aman Khatun* (1932) 59 I.A. 21, 54 All. 46, 135 I.O. 762, ('32) A.P.O. 26.

(v) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(w) *Dhan Bibi v. Lodon Bibi* (1900) 27 Cal. 801; *Froz Din v. Nawab Khan* (1928) 9 Lah. 224, 109 I.O. 779, ('28) A.L. 432; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 119, 121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(x) *Umanmiya v. Fali Mahomed* (1916) 40 Bom. 28, 30 I.O. 904.

(y) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(z) (1921) 48 I.A. 114, 120-121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(a) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.O. 837, ('22) A.P.O. 159.

(b) *Fuzuln Begum v. Omdah Begum* (1868) 10 W.R. 469, cited with approval in *Sadik Husain v. Hashim Ali* (1916) 43 I.A. 212, 232, 38 All. 627, 659, 36 I.O. 104; *Umanmiya v. Fali Mahomed* (1916) 40 Bom. 28, 30 I.O. 904.

(c) *Abdool Rasack v. Aga Mahomed Jaffer* (1893) 21 I.A. 56, 70, 21 Cal. 666, 679.

3. *Clause (2): age.*—The acknowledger must be at least twelve and a half years older than the person acknowledged: Baillie, 411. Ch. XVII.  
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4. *Clause (3): Offspring of fornication.*—The issue of adultery, incest or fornication, cannot be legitimated by acknowledgment. If the marriage is *disproved*, the issue would be the issue of fornication. Similarly, the issue of a re-marriage between divorced persons, where the wife was repudiated by a triple divorce and no intermediate marriage is proved, would also be the issue of fornication on the footing that such re marriage is void (*d*).

No presumption of marriage arises from long cohabitation if the woman was a prostitute when she was brought to the home of the man whose wife she claims to be (*e*). But if the man acknowledges his children by her as his legitimate children, marriage with her will be presumed, for marriage with a prostitute is not prohibited, and she could have been his lawful wife, when the children were begotten (*f*). But if it is definitely proved that there was no marriage at all between the parties when the children were begotten, in other words, if marriage is *disproved*, the issue would be the issue of fornication, and they could not possibly be legitimated by acknowledgment as laid down in the case cited in foot-note (*c*).

5. *Clause (5): repudiation.*—The person acknowledged is entitled to repudiate the acknowledgment, if he has attained an age when he can understand the transaction.

250. *Right of inheritance.*—If an acknowledgment is of legitimate sonship, and that relationship is possible in fact and in law [s. 249], it raises a presumption of marriage between the acknowledger and the mother of the person acknowledged, and, unless rebutted, gives such person the right of inheritance to the acknowledger as his legitimate child (*g*), and a similar right also to the mother as the lawful wife of the acknowledger (*h*).

Clear and reliable evidence that a Mahomedan has acknowledged children as his legitimate issue raises a presumption of a valid marriage between him and the children's mother (*i*).

251. *Acknowledgment of legitimacy irrevocable.*—An acknowledgment once made cannot be revoked (*j*).

(d) *Rashid Akmad v. Anisa Khatun* (1882) 59 I.A. 21, 54 All. 46, 135 I.C. 702, ('82) A.P.O. 25.

(e) *Ghazanfar v. Kaniz Fatima* (1910) 37 I.A. 105, 22 All. 345, 6 I.O. 674.

(f) *Imambandi v. Muteaddi* (1913) 45 I.A. 73, 81-82, 45 Cal. 878, 889-900, 47 I.O. 513.

(g) *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.O. 150; *Mahammad Asmat v. Lalli Begum* (1881) 8 Cal. 422, 9 I.A. 8; *Sadakat Hossein v. Mahomed Yusuf* (1883) 10 Cal. 668, 11 I.A. 81.

(h) *Khajak Hidayat v. Rai Jan Khanum* (1844) 3 M.I.A. 295, 318; *Wase v. Sunduloonisa* (1867) 11 M.I.

A. 178, 193; *Newab Mukta Jehan v. Mahomed* (1878) Sup. Vol. I.A. 192; *Khafooroonisa v. Rowshan Jehan* (1876) 2 Cal. 184, 198, 3 I.A. 291; *Mahatula v. Husemoosoman* (1881) 10 C.L.R. 293; *Imambandi v. Muteaddi* (1913) 45 I.A. 73, 82, 45 Cal. 878, 890, 47 I.O. 513; *Habibur Rahman v. Altaf Ali* (1921) 48 I.A. 114, 121, 48 Cal. 856, 60 I.C. 837, ('22) A.P.O. 150.

(i) *Imambandi v. Muteaddi* (1913) 45 I.A. 73, 81-82, 45 Cal. 878, 889, 890, 47 I.C. 513.

(j) *Ashrafud Dowlah v. Hyder Hossein* (1866) 11 M.I.A. 94; *Muhammad Akhaddad v. Muhammad Ismail* (1888) 10 All. 289, 317.

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**252. Adoption not recognized.**—The Mahomedan law does not recognize adoption as a mode of filiation (*k*).

Where custom is given priority by legislation over general Mahomedan law, as in the Punjab, Oudh and some other places (secs. 10, 10A, 11 and 12 above), a special family or tribal custom of adoption will, if proved, prevail over that law.

The Oudh Estates Act, 1869, sec. 29, permits a Mahomedan talukdar to adopt a son to him (*l*).

The retention by Hindu converts to Mahomedanism of Hindu usages of inheritance and succession does not carry with it the Hindu custom of adoption. The burden of proving that the custom of adoption has also been retained lies on those who assert it (*m*). Although a Mahomedan may be entitled under the law prevailing in a Native State to adopt a son, such a son cannot succeed to the property of his adoptive father in British India in the absence of evidence establishing a custom to that effect in British India (*n*).

The above notes to this section are to be read subject to the Shariat Act, 1937.

- (*k*) *Muhammad Alikhdad v. Muhammad Ismael* (1888) 10 All. 280, 840; *Muhammad Umar v. Muhammad Nae-ud-Din* (1912) 39 Cal. 418, 89 I.A. 19, 13 I.O. 344. *Mir Zaman v. Nur Alam* (1936) 162 I.C. 314, ('36) A. Peeh. 108.  
(*l*) See *Abdul Halim Khan v. Saadat Ali*

- Khan* (1932) 59 I.A. 202, 7 Luck. 194, 186 I.C. 745, ('32) A.P.C. 187.  
(*m*) *Bai MacAhbhai v. Bai Hirbai* (1911) 35 Bom. 264, 10 I.C. 816.  
(*n*) *Ayubsha v. Babalai* (1938) Bom. 150, 39 Bom. L. R. 1324, 173 I.C. 801, ('38) A.B. 111.

## CHAPTER XVIII.

### GUARDIANSHIP OF PERSON AND PROPERTY.

#### *A.—Appointment of Guardians.*

**253. Age of majority.**—In this Chapter, “minor” means a person who has not completed the age of eighteen years.

See the Indian Majority Act IX of 1875, sec. 3, and the Guardians and Wards Act VIII of 1890, sec. 4, cl. (1).

*Age of majority under the Mahomedan law.*—According to the Islamic law, the minority of a male or female terminates when he or she attains puberty. Amongst the Hanafis and the Shias, puberty is presumed on the completion of the fifteenth year. Under the Indian Majority Act (s. 3), minority ceases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years.

Under the Mahomedan law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, and the only matters in which a Mahomedan is now entitled to act on attaining the age of fifteen years are (1) marriage, (2) dower and (3) divorce. In all other matters his minority continues until the completion at least of eighteen years. Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act. See notes to sec. 101 above.

**253A. Application for appointment of guardian.**—All applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890.

Any person who is entitled to be a guardian by the Mahomedan law may act as such without any previous order of the Court. But there is nothing to prevent him from applying to the Court under the Guardians and Wards Act, that he may be appointed or declared a guardian under the Act. He is not bound to wait until his legal title or fitness to act as guardian is disputed by another person. The application for the appointment of a guardian may be made not only by a person desirous of being, or claiming to be, the guardian of the minor, but also by any relative or friend of the minor, and in some cases by the Collector (s. 8 of the Act). It should be in the form prescribed by sec. 10 of the Act, and no order should be made unless notice of the application is given to persons interested in the minor (s. 11 of the Act).

**254. Power of Court to make order as to guardianship.**—When the Court is satisfied that it is for the welfare of a minor that an order should be made (1) appointing a

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**Ss.** guardian of his person or property, or both, or (2) declaring a  
**254-256** person to be such guardian, the Court may make an order accordingly.

Guardians and Wards Act, 1890, sec. 7.

**255. Matters to be considered by Court in appointing guardian.**—(1) In appointing or declaring the guardian of a minor, the Court shall, subject to the provisions of this section, be guided by what, *consistently with the law to which the minor is subject*, appears in the circumstances to be for the *welfare* of the minor.

(2) In considering what will be for the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent, and any existing or previous relations of the proposed guardian with the minor or his property.

(3) If the minor is old enough to form an intelligent preference, the Court may consider that preference.

*Welfare of the minor.*—The above section is a reproduction in terms of sec. 17, cls. (1), (2) and (3), of the Guardians and Wards Act. It imposes a duty upon the Court in appointing a guardian to make the appointment *consistently with the law to which the minor is subject*. The central idea is the *welfare* of the minor, and the Allahabad High Court has said that though the rules of Mahomedan law have to be taken into consideration, the main question to be considered is what would be conducive to the child's welfare (a). In a Rangoon case the mother had lost her right under Mahomedan law as she had been divorced and had remarried a Buddhist. She was nevertheless appointed guardian, as the Court considered that the interests of the minor would be best promoted by leaving her with the mother (b).

### *B.—Guardians of the Person of a Minor.*

(i) *Custody of boys under seven and of girls under the age of puberty.*

**256. Right of mother to custody of infant children.**—The mother is entitled to the custody (*hizanat*) of her male child until he has completed the age of seven years and of her female child until she has attained puberty. The right continues though she is divorced by the father of the child (c), unless she marries a second husband in which case the custody belong to the father (d).

(a) *Mt. Haidri v. Jawad Ali* (1934) All.L.J. 899, 150 I.O. 149, ('34) A.A. 722.

(b) *Ma Jali v. Moola Ebrahim* (1938) 145 I.O. 848, ('38) A.B. 201.

(c) *Baillia, 435; Zarakibi v. Abdul Rezaq* (1910) 12 Bom.L.R. 891, 8 I.O. 618; *Emperor v. Ayashahi* (1904)

6 Bom.L.R. 536; *Allah Nahi v. Karam Nahi* (1933) 14 Lsh. 770, 147 I.O. 128, ('33) A.L. 909; *Mt. Haidri v. Jawad Ali* (1934) All.L.J. 899, 150 I.O. 149, ('34) A.A. 722.

(d) *Ulfat Bibi v. Bafati* (1927) 49 All. 779, 102 I.O. 103, ('27) A.A. 581.

*Hedaya*, 138; *Baillie*, 435.

*Nature, and extent of right of hisanat (custody).*—In *Imambandi v. Mutsaddi* (e), their Lordships of the Privy Council said: "It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the *Sunni* law) is the legal guardian."

It would appear from the passage quoted above that the father is the primary and natural guardian of his minor children, and that the right of custody of the mother and the female relations mentioned in sec. 257 below is subject to the supervision of the father which he is entitled to exercise by virtue of his guardianship. If so, the right of *hisanat* does not carry with it all the powers which a guardian of the person of a minor has under the Guardians and Wards Act, 1890. See note to sec. 260, "Father as guardian of his minor children."

*Shia law.*—Under the *Shia* law, the mother is entitled to the custody of a male child until he attains the age of two years, and of a female child until she attains the age of seven years. After the child has attained the above-mentioned age, the custody belongs to the father (f). If the mother dies before the child has attained that age, the father is entitled to the custody (g). On the death of both the parents, the custody belongs to the father's father. It is doubtful to whom the custody belongs in the absence of the father's father: *Baillie*, II, 95.

*Shafi law.*—It has been observed that under *Shafi* Law the mother is entitled to the custody of her daughter even after she has attained puberty and until she is married (h).

### 257. Right of female relations in default of mother.—

Failing the mother, the custody of a boy under the age of seven years, and of a girl who has not attained puberty, belongs to the following female relatives in the order given below:—

- (1) mother's mother, how high soever;
- (2) father's mother, how high soever;
- (3) full sister;
- (4) uterine sister;
- (5) [consanguine sister];
- (6) full sister's daughter;
- (7) uterine sister's daughter;
- (8) [consanguine sister's daughter];
- (9) maternal aunt, in like order as sisters; and

(e) (1918) 45 I.A. 79, 88-84, 45 Cal. 879, 47 I.O. 613; *Ulfat Bibi v. Bafat* (1927) 49 All. 778, 102 I.O. 108, ('27) A.A. 551; *Mt. Siddiq-un-nissa v. Nizam-uddin* (1932) 54 All. 128, 187 I.O. 219, ('32) A.A. 215; *Mt. Ghuran v. Riaz Ahmad* (1935) 11 Luck. 558, 158 I.O. 581, ('35) A.O. 402; *Fatima Bibi v. Pentu Sahab* (1941) 2 M.L.J.

548, (1941) M.W.N. 1040, ('41) A.M. 944.  
(f) *Lardh v. Mahomed* (1887) 14 Cal. 515.  
(g) *Salam-un-nissa v. Saadat* (1914) 36 All. 466, 24 I.O. 582.  
(h) *Muhaidin Tharaganar v. Sainambu Ammal* (1941) Mad. 760, (1941) 1 M.L.J. 508, (1941) M.W.N. 808, ('41) A.M. 589.

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(10) paternal aunt, also in like order as sisters.

*Hedaya*, 138; Baillie, 435-436. Neither the *consanguine sister* (No. 5) nor her daughter (No. 8) is expressly mentioned either in the *Hedaya* or the *Fatawa Alamgiri*; it almost seems as if the omission is accidental, for *paternal aunts* are expressly mentioned.

If the minor's mother has lost her right by remarriage, the mother's mother has a right of guardianship preferential to the father's mother (i). A maternal aunt has a preferential right to the custody of a minor over the step-mother of the father of the minor (j). It has been held that the rights of the female relations of the mother cannot be taken away by the father appointing by his will other persons as the guardians of his minor children (k).

**258. Females when disqualified for custody.**—A female, including the mother, who is otherwise entitled to the custody of a child, loses the right of custody—

- (1) if she marries a person not related to the child within the prohibited degrees (ss. 201-202), *e.g.*, a stranger (l), but the right revives on the dissolution of the marriage by death or divorce (m); or,
- (2) if she goes and resides, during the subsistence of the marriage, at a distance from the father's place of residence; or,
- (3) if she is leading an immoral life, as where she is a prostitute (n); or,
- (4) if she neglects to take proper care of the child.

*Hedaya*, 138-139; Baillie, 435-436.

The reason of the rule in cl. (1) is that if a woman marries a man not closely related to the child, the child may not be treated kindly. It is otherwise, however, where the mother, for instance, marries her child's paternal uncle or the maternal grandmother marries the paternal grandfather, because these men, being as parents, it is to be expected that they will treat the child kindly: *Hedaya*, 138. Where, however, there are no relations willing and able to look after the minor child, the mother who has become disqualified by marrying a stranger may be appointed by the Court as the guardian of her minor child (o).

**Apostasy.**—Apostasy is stated in the *Fatawa Alamgiri* to be a ground of disqualification. The reason given is that a woman who relinquishes the Moslem faith has to be kept in prison till she returns to the Mahomedan faith: Baillie,

(i) *Nur Begum v. Mt. Begum* (1984) 149 I.O. 972, ('84) A.L. 274.

(j) *Tumina Khatun v. Goharjan Bibi* (1941) 1 Cal. 419, 45 C.W.N. 515, ('42) A.O. 281.

(k) *In re Iavo* (1942) Kar. 215, ('42) A.S. 118.

(l) *Nur Begum v. Mt. Begum* (1984) 149 I.O. 972, ('84) A.L. 274; *Kundan*

*v. Aleha Begum* (1935) A.L.J. 982, 173 I.O. 1003, ('39) A.A. 15.

(m) *Fussahun v. Eajo* (1864) 10 Cal. 15; *Bhoocha v. Elahi Buz* (1886) 11 Cal. 574; *Ansar Ahmad v. Samidan* ('28) A.O. 220, 104 I.O. 822.

(n) *Aburi v. Dunne* (1878) 1 All. 598.

(o) *In re Ghulam Mahomed* (1942) Kar. 269, ('42) A.S. 184.

435. But this reason cannot apply in British India; hence apostasy would not be a disqualification in British India: Baillie, 435, f.n. (3). See also Act XXI of 1850, and notes to sec. 208 above.

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**259. Right of male paternal relations in default of female relations.**—In default of the mother and the female relations mentioned in sec. 257, the custody belongs to the following persons in the order given below:—

- (1) the father;
- (2) nearest paternal grandfather;
- (3) full brother;
- (4) consanguine brother;
- (5) full brother's son;
- (6) consanguine brother's son;
- (7) full brother of the father;
- (8) consanguine brother of the father;
- (9) son of father's full brother;
- (10) son of father's consanguine brother:

*Provided* that no male is entitled to the custody of an unmarried girl, unless he stands within the prohibited degrees of relationship to her (ss. 201-202).

If there be none of these, it is for the Court to appoint a guardian of the person of a minor.

*Nedaya*, 138-139; Baillie, 437.

It is clear from the proviso to the section that though a *boy* may be put in the custody of his paternal uncle's son, a *girl* should not be entrusted to him, for he is not within the prohibited degrees: Baillie, 437.

*Husband as guardian.*—The Court has no power under the Guardians and Wards Act [s. 19 (1)] to appoint a guardian of the person of a minor, where the minor is a married woman, and her husband is not in the opinion of the Court *unfit* to be the guardian of her person. If it be a rule of the Mahomedan law that a husband is not entitled to the custody of his wife until she has attained puberty, it must be taken to rest on the hypothesis that he is *unfit* by that law for that custody. If so, the Court may hold under sec. 19 of the Guardians and Wards Act that a Mahomedan husband is "unfit" within the meaning of that section to be the guardian of the person of his wife until she has attained puberty, and may, consistently with the provisions of that section, appoint her mother as her guardian until she attains puberty.

**259A. Custody of child-wife.**—The mother of a girl who is married, but has not attained puberty, is entitled to the custody of the girl as against the husband of the girl (*p*).

See Guardians and Wards Act, 1890, sec. 19.

(*p*) *Nur Kadir v. Zuleikha Bibi* (1885) 11 Cal. 649; *Korben v. King Emperor*

. (1904) 32 Cal. 444.



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(11) *Custody of boys over seven and of girls who have attained puberty.*

260. Right of father and paternal male relations to custody of boy over seven and of girl who has attained puberty.—The father is entitled to the custody of a boy over seven years of age (*q*) and of an unmarried girl who has attained puberty. Failing the father, the custody belongs to the paternal relations in the order given in sec. 259 above, and subject to the proviso to that section.

If there be none of these, it is for the Court to appoint a guardian of the person of the minor.

*Hedayat*, 120; *Baillie*, 438

*Father as guardian of his minor children.*—The Court has no power under the Guardians and Wards Act [s. 19 (2)] to appoint a guardian of the person of a minor whose father is living, and is not in the opinion of the Court unfit to be guardian of the minor (*r*). A father is under the Mahomedan law entitled to the custody of his son after he has completed the age of seven years, and of his daughter after she has attained the age of puberty, but there is no rule of Mahomedan law that he is entitled to that custody even if he is unfit for it. The Court, therefore, has power to appoint the mother or any other person whom it thinks proper, guardian of the person of the minor, if the father is, in its opinion, unfit to be such guardian. The Court is not bound, if the father is unfit, to appoint the person entitled next after him, namely, the father's father, guardian of the person of the minor, for the father's father has no legal right to the guardianship during the lifetime of the father. The paramount consideration in such a case should be the *welfare* of the minor. The fact that the father has married again does not render him unfit for the guardianship of his child (*s*).

*Testamentary guardian of person.*—The father may, it seems, entrust the custody of his minor children to the executor appointed by his will: *Baillie*, 476.

It has been held by the Chief Court of Sind that where the father at the time of his death was not entitled to the custody of the children, he was not entitled to appoint by will a guardian of the person of his children in derogation of the rights of the persons entitled to act as such guardians under the Mahomedan Law. As the mother had predeceased the father, the female relations of the mother were held entitled to the guardianship of the minor daughters although the father had appointed by will a great paternal uncle of the minor daughters as their guardian (*t*).

(12) *Custody of illegitimate children.*

261. Custody of illegitimate children.—The custody of illegitimate children belongs to the mother and her relations [*Macnaghten*, 298].

(q) *Idu v. Amiran* (1886) 8 All. 822.  
(r) *Besant v. Narayanaiah* (1914) 41 I.A. 814, 824, 88 Mad. 807, 822, 24 I.O. 290.  
(s) *Siddiq-un-nissa v. Nisam-uddin* (1932)

54 All. 128, 187 I.O. 219, ('32)  
A.A. 215.  
(t) *In re Iseo* (1942) Kar. 215. ('42)  
A.S. 118.

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262. \* Legal guardians of property.—The following persons are entitled in the order mentioned below to be guardians of the property of a minor (u):—

- (1) the father;
- (2) the executor appointed by the father's will;
- (3) the father's father;
- (4) the executor appointed by the will of the father's father.

Baillie, 689; Macnaghten, 62, 304.

*Mother, brother, uncle, etc., not legal guardians.*—The four guardians mentioned in this section are hereinafter called *legal guardians*. The only relations who are *legal guardians of the property* of a minor are (1) the father, and (2) the father's father. No other relation is entitled to the guardianship of the property of a minor *as of right*, not even the mother, brother or uncle. But the father or the paternal grandfather of the minor may appoint the mother, brother, uncle, or any other person as his executor or executrix, in which case they become *legal guardians* and have all the powers of a *legal guardian* as defined in secs. 263 and 267. The Court also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian appointed by the Court, as stated in secs. 264 and 267A. See note 1 to sec. 265 below.

The only persons who are entitled to appoint a guardian of the property of a minor by will are his father and father's father. Even the mother has no power to appoint by will a guardian of the property of her minor children. A mother's executor is not a *legal guardian*, nor is a brother's executor, nor an uncle's executor. In fact, no executor, except the father's executor or the father's father's executor, can be a *legal guardian* of the property of the minor: Macnaghten, 304. As to the powers of a *legal guardian*, see secs. 263 and 267.

*Testamentary guardian of property.*—Any person appointed executor by the will of the father or paternal grandfather of the minor becomes by virtue of his office legal guardian of the property of the minor. But can the father or paternal grandfather appoint one person his executor and another person guardian of the property of the minor? It would appear that he can (v): Baillie, 682.

262A. Guardian of property appointed by Court.—In default of the legal guardians mentioned in sec. 262, the duty of appointing a guardian for the protection and preservation of the minor's property falls on the judge as representing the Sovereign (w).

Baillie, 689.

(u) *Imambendi v. Mutsaddi* (1918) 45 I.A. 73 83-84, 45 Cal. 878, 892, 893, 47 I.O. 818; *Ara Begam v. Deputy Commissioner of Gondia* (1941) O.W.N. 906, 195 I.O. 787, ('41) A.O. 529.

(v) *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 55, 84 All. 218, 18 I.O. 976.

(w) *Imambendi v. Mutsaddi* (1918) 45 I.A. 73, 84, 45 Cal. 878, 898, 47 I.O. 818.

**Ss. 262A-263.** *Appointment of guardian by Court.*—If there is no legal guardian (s. 262), the Court may appoint any other person guardian of the property of a minor. In so doing, the Court should be guided by what appears in the circumstances to be for the *welfare* of the minor [s. 255 (1) and (2)]. Thus, the Court may appoint the mother guardian of the property of her minor son in preference to his paternal uncle (x). The fact that the mother is a *pardanashin* lady is no objection to her appointment (y).

The Court is not bound to appoint paternal relations guardians of property in preference to maternal relations. If the *welfare* of the minor requires it, the Court may appoint a maternal relation. The Court must also have regard to the *wishes of the minor's father*. Both these grounds concurred in a case in which a brother of the father's first wife was appointed guardian of the property of the minor in preference to a step-brother of the father (z).

**262B. De facto guardian.**—A person may neither be a legal guardian (s. 262) nor a guardian appointed by the Court (s. 262A), but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor (a).

The expression “*de facto* guardian” is used in contradistinction to “*de jure* guardian.” Legal guardians (s. 262) and guardians appointed by the Court (s. 262A) are *de jure* guardians. The mother, brother, uncle, and all relations other than the father and father's father are *de facto* guardians, unless they are appointed executors by the will of the father or father's father (s. 262), or are appointed guardians by the Court (s. 262A).

**263. Alienation of immovable property by legal guardian.**—A legal guardian of the property of a minor [s. 262] has no power to sell the *immovable* property of the minor except in the following cases, namely, (1) where he can obtain double its value; (2) where the minor has no other property and the sale is necessary for his maintenance; (3) where there are debts of the deceased, and no other means of paying them; (4) where there are legacies to be paid, and no other means of paying them; (5) where the expenses exceed the income of the property; (6) where the property is falling into decay; and (7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution (b).

(x) *Alim-ullah v. Abadi* (1906) 29 All. 10.

(y) *Jaisanti v. Gajadhar* (1911) 38 Cal. 788, 785, 10 I.O. 884.

(z) *Mahomed Sayeed v. Ismail* ('81) A. R. 56, 181 I.O. 497.

(a) *Imambandi v. Muteaddi* (1918) 45 I.A. 73, 84, 45 Cal. 278, 894-895, 47 I.O. 518; *Mohammed Hias v. Mohammed Iftikhar* (1932) 59 I.A. 92, 101, 7 Luck. 1, 136 I.O. 97

('32) A.P.O. 78, *Muhammad Mairuddin Mia v. Nahn; Bala Devi* (1937) 2 Cal. 187, ('37) A.O. 284; *Anto v. Rositi Kuer* (1937) All. 195, 166 I.O. 61, ('86) A.A. 837.

(b) *Imambandi v. Muteaddi* (1918) 45 I.A. 73, 91, 45 Cal. 878, 47 I.O. 518; *Eurbi v. Huray* (1896) 20 Bom. 116, 121; *Kali Dutt v. Abdul Ali* (1888) 16 Cal. 627, 15 I.A. 96; *Thottoli v. Kunhammed* (1910)

Baillie, 687-688; Macnaghten, p. 64, sec. 14, pp. 305, 306.

**Mortgage.**—The same rules apply to a mortgage and unless it is a case of absolute necessity the mortgage is invalid (c).

**Lease.**—The father or other lawful guardian may grant a lease, if it be for the benefit of the minor (d).

**Where minor's title to property is in dispute.**—The prohibition against alienation referred to in this section applies to immovable property to which the minor has an undisputed title. It does not apply where the minor's title to the property is disputed. Thus, where the father of a minor sold part of the immovable property inherited by the minor from his mother, *the title to which was in dispute*, and the sale was made pursuant to a compromise which put an end to pending litigation, the sale was held to be binding on the minor as being one for the minor's benefit (e). As to the power of a legal guardian to dispose of movable property belonging to his ward, see sec. 267 below.

**264. Alienation of immovable property by guardian appointed by Court.**—A guardian of property appointed by the Court under the Guardians and Wards Act, 1890 [s. 262A] has no power *without the previous permission of the Court*, to mortgage or charge, or transfer by sale, gift, exchange, or otherwise, any part of the *immovable property* of his ward, or to lease any part of *that property* for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. A disposal of *immovable property* by a guardian in contravention of the foregoing provisions is *voidable* at the instance of the minor or any other person affected thereby (f). Permission to the guardian to do any of the acts mentioned above must not be granted by the Court except in case of necessity or for an evident advantage to the ward [Guardians and Wards Act, 1890, ss. 29, 30, 31].

**Reference to arbitration by guardian appointed by the Court.**—There are dicta of the High Court of Allahabad to the effect that a guardian appointed by the Court may refer to arbitration *without the permission of the Court* disputes as to the distribution of *immovable properties* of the minor's father, but that it is an irregularity if the guardian makes a reference without the "opinion, advice or direction" of the Court under sec. 33 of the Act. There is no indication in the judgment as to the consequences of such an irregularity (g).

As to the disposal of *movable property* by a guardian appointed by the Court, see sec. 267A below.

**265. Alienation of immovable property by de facto guardian.**—A *de facto* guardian [s. 262B] has no power to

34 Mad. 527, 8 I.C. 1093; *Mohammud Abdur Rahim Khan v. Mohammad Abdul Ghazi Khan* ('37) A.O. 56, 165 I.C. 597.  
(c) *Yasjuddin Pramanick v. Rup Manjari* ('36) A.O. 326.  
(d) *Hasbunnessa Begum v. Mrs. Danagher* (1936) 59 Mad. 942, 163 I.C. 384, ('36) A.M. 564.

(e) *Kali Dutt v. Abdul Ali* (1888) 16 Cal 627, 16 I.A. 96.

(f) *Solema Bibi v. Hafes Mohammad* (1927) 54 Cal. 687, 104 I.C. 833, ('27) A.O. 836.

(g) *Said-un-nissa v. Ruqaiya Bibi* (1931) 53 All. 428, 130 I.C. 201, ('31) A.A. 307.

- S. 265 transfer any right or interest in the *immovable* property of the minor. Such a transfer is not merely voidable, but void (*h*).

1. *Mother, brother, uncle, etc., as de facto guardians.*—The mother, as has already been stated, is not the legal guardian of the property of her minor children (see note to sec. 262). She is merely a *de facto* guardian—a bare custodian of their property, and has no power to sell, mortgage, or otherwise deal with immovable property belonging to them. As stated by their Lordships of the Privy Council in *Imambandi v. Mutsaddi* (1), which is the leading case on the subject, “the mother has no larger powers to deal with her minor child’s property than any outsider or non-relative who happens to have charge for the time being of the infant.” A sale, mortgage, or any other transfer by the mother is wholly void (*j*). The same remarks apply to a brother, uncle, and other relations. An alienation by a brother (*k*), uncle (*l*), or any other relation of the minor’s immovable property is wholly void. If the alienor is let into possession of the property, his possession, so far as regards the minor’s share, is no better than that of a *trespasser* (*m*). The Sind Chief Court has held that the lessee under a lease granted by a *de facto* guardian of a minor is liable to pay compensation to the minor for use and occupation of the land (*n*).

The next question to consider is whether a sale or mortgage made by a *de facto* guardian is binding on the minor, if it was made to satisfy a mortgage or other debts of his father or other person from whom he acquires the property. In *Mata Din v. Ahmad Ali* (o), a Mahomedan executed a mortgage of his immovable property. He then died leaving a will by which he bequeathed the property to his four grandsons, one of whom was a minor, in equal shares subject to equal obligations in respect of his debts. After his death the three elder grandsons sold the mortgaged property including the minor’s share to the mortgagee to satisfy the mortgage debt and other debts of the deceased. It was held by the Privy Council that the sale, though made to satisfy the debts of the deceased, was not binding on the minor, and that he was entitled to redeem his one-fourth share of the mortgaged property. In a Lahore case (*p*), a Mahomedan executed a mortgage of his immovable property in favour of A. He then died leaving a widow and minor children. The widow borrowed Rs. 3,000 from B, out of which she paid Rs. 2,500 which was the amount due to A under his mortgage, and mortgaged the same property to B. The balance of Rs. 500 was applied by her towards the maintenance of the children. The mortgage was for a term of 60 years, and B was let into possession. B spent Rs. 400 in improving the property. The children afterwards brought a suit against B to recover possession of their share of the property. It was held that the mortgage of the children’s share was void, but the mortgage was set aside conditionally upon the children paying to B the amount by which they

- (h) *Imambandi v. Mutsaddi* (1918) 45 I.A. 78, 45 Cal. 878, 47 I.O. 513; *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 84 All. 218, 18 I.O. 976; *Kannusami Chetti v. Rahnai Ammal* (1938) 65 Mad.L.J. 548, 147 I.C. 88, (23) A.M. 806, 818.
- (i) (1918) 45 I.A. 78, 88, 45 Cal. 878, 894, 47 I.O. 518.
- (j) *Imambandi v. Mutsaddi* (1918) 45 I.A. 78, 45 Cal. 878, 47 I.O. 518; *Muhammad Shah v. Mat. Kalem Bibi* (1928) 4 Lah. 467, 79 I.O. 260, (24) A.L. 200; *Ghulam Hussain v. Mir Jakir* (1940) Nag. 553, (1938) N.L.J. 409; *Sambhu Gopin v. Pyan Mien* (1941) 198 I.O. 258, 7 B.R. 520.
- (k) *Mata Din v. Ahmad Ali, supra*; *Fateh Din v. Gurmukh Singh* (1929) 10 Lah. 385, 118 I.O. 227, (29) A.L. 810.
- (l) *Vizian-vd-din v. Anandi* (1896) 18 All. 373.
- (m) *Imambandi v. Mutsaddi* (1918) 45 I.A. 78, 92-93, 45 Cal. 878, 908-904, 47 I.O. 518.
- (n) *Azizul Rahman Fatehullah v. Ohoithram* (1940) Kar. 200, 190 I.O. 258, (40) A.S. 129.
- (o) (1912) 39 I.A. 49, 84 All. 218, 18 I.O. 976.
- (p) *Rang Ilahi v. Mahbub Ilahi* (1926) 7 Lah. 85, 94 I.O. 25, (26) A.L. 170.

had benefited, namely, Rs. 2,500+Rs. 500+Rs. 400=3,400. This decision probably goes too far, and may require reconsideration.

2. *Limitation for suit to set aside transfer of property by de facto guardian.*—Art. 44 of Sch. I of the Limitation Act, 1908, prescribed a period of 3 years within which a ward who has attained majority may sue to set aside a transfer of his property made by his guardian, the time running from the date of the ward's majority. This article applies to a transfer by a lawful guardian, and not one by a *de facto* or unauthorized guardian. The article that applies to a transfer by a *de facto* guardian is art. 144 read with sec. 8 of the Act. Art. 144 deals with immovable property, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff (q).

3. *Reference to arbitration by de facto guardian.*—The principle of the Privy Council decision in *Imambandi v. Mutsaddi* referred to in note 1 above has been applied to a reference to arbitration by a *de facto* guardian. Such a guardian has no power to refer to arbitration disputes as to the distribution of immovable properties of the minor's father, and the minor is not bound by an award made on such a reference. Nor does the subsequent appointment of the *de facto* guardian as guardian of the minor under sec. 10 of the Guardians and Wards Act, 1890, make the award binding upon the minor in the absence of evidence that the Court approved of the reference (r).

4. *Continuance of partnership business.*—It has been held, following the principle of the ruling in the Privy Council case of *Imambandi v. Mutsaddi* referred to in note 1 above, that where the father of a minor was a member of a firm which owned a rice mill and carried on rice milling business, the mother has no power to enter into an agreement with the surviving partners on behalf of the minor to continue the partnership business. Such an agreement is void (s). Whether under the Mahomedan Law or on general principles defining the relations between a ward and a guardian, a guardian as such has no power to carry on business on behalf of his ward, especially if the business is such as may involve the minor's estate in speculation or loss, and it is immaterial whether the business was that of the father of the minor or there was a break in it (t).

5. *Bequest to an heir.*—On the same principle a mother cannot validate a bequest to an heir by consenting on behalf of her minor children who are co-heirs (u).

6. *Ratification.*—As a sale by a *de facto* guardian of the minor's immovable property is not merely voidable but is void, it cannot be ratified by the minor on attaining majority (v). A contrary decision of the Peshawar Court is, it is submitted, incorrect (w).

7. *Agra Tenancy Act.*—Settlement of agricultural land forming part of a zamindari property, inherited by a Mahomedan widow and her minor son, with a tenant for agricultural purposes does not amount to an alienation of the minor's interests in the immovable property (x).

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(q) *Mata Din v. Ahmad Ali* (1912) 39 I.A. 49, 34 All. 213, 13 I.O. 976.

(r) *Mohammad Ehas v. Mohammad Ifthikhar* (1932) 59 I.A. 92, 7 Luck. 1, 136 I.O. 97, ('82) A.P.O. 78; *Mohamed-din v. K. Ahmad* (1920) 47 Cal. 713, 57 I.O. 945.

(s) *Khorasany v. Acha* (1928) 6 Rang. 198, 110 I.O. 849, ('28) A.R. 160.

(t) *Ahmad Ibrahim Saheb v. Meyyappa*

*Ohtsler* (1940) Mad. 285, (1939) M.W.N. 976, ('40) A.M. 285.

(u) *Bibi Kuleom v. Mt. Mariam* (1938) 148 I.O. 108, ('38) A.O. 97.

(v) *Asio v. Reoti Kuar* (1937) All. 195, 166 I.O. 61, ('36) A.A. 837.

(w) *Jawahar Singh v. Kohat Municipality* ('37) A. Pesh. 74, 170 I.O. 63.

(x) *Tahad Ali v. Ierar-Ullah* (1930) All. 89, (1938) A.L.J. 1110, 180 I.O. 504, ('39) A.A. 121.

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As to the powers of a *de facto* guardian to deal with the *m* of the minor, see sec. 268 below.

**266. Agreement by guardian for purchase of immovable property for his ward.**—Neither the guardian of a minor nor the manager of his estate is competent to bind the minor or his estate by an agreement for the *purchase* of immovable property. Such an agreement is *void* (*y*).

[*A*, the manager of the estate of a minor, *B*, agrees to purchase from *C* immovable property on behalf of *B*. The agreement is *void*, and neither *B* nor *C* can sue for specific performance of the contract.].

**267. Power of legal guardian to dispose of movable property.**—A legal guardian of the property of a minor [s. 262] has power to sell or pledge the goods and chattels of the minor for the minor's imperative necessities, such as food, clothing, or nursing (*z*).

**267A. Power of guardian appointed by Court to dispose of movable property.**—A guardian of the property of a minor *appointed by the Court* [s. 262A] is bound to deal with *movable property* belonging to the minor as carefully as a man of ordinary prudence would deal with it if it were his own [Guardians and Wards, Act, 1890, s. 27].

**268. Power of *de facto* guardian to dispose of movable property.**—A *de facto* guardian [s. 262B] has the same power to sell and pledge the goods and chattels of the minor in his charge as a legal guardian of his property (*a*).

A mother has no power as *de facto* guardian to enter into any contract whereby a minor would be saddled with any pecuniary liability (*b*). Nor has a brother (*c*). It has been held in Madras that she has power to renew a promissory note executed by the minor's father and so stave off an execution against the minor's property (*d*), *sed quaere*.

(v) *Mir Sarwarjan v Fakhruddin* (1912)

39 I.A. 1, 39 Cal 232, 13 I.O. 331

(x) *Imambandi v Mutsaddi* (1918) 45 I.A.

78, 86-87, 45 Cal 878, 895-896, 47

I.O. 513.

(a) *Imambandi v. Mutsaddi* (1918) 45

I.A. 73, 86-87, 45 Cal 878, 895-896,

47 I.C. 513.

(b) *Ghulam Ali v. Inayat Ali* (1933) 141

I.O. 68, ('33) A.L. 95; *Kunahi*

*v. Khatani Amma* (1939) 2 M.L.J.

463, ('39) A.M. 881

(c) *Nasruddin v. Kharagnarain* (1939)

177 I.C. 302, ('39) A.P. 29

(d) *Venkatarayudu v. Khasim Sahab*

(1935) 160 I.O. 268, ('35) A.M.

1041; Dissented from in *Kunahi v.*

*Khatani Amma* (1939) 2 M.L.J.

463, ('39) A.M. 881.

## CHAPTER XIX.

### MAINTENANCE OF RELATIVES.

**268A. Maintenance defined.**—"Maintenance" in this Chapter includes food, raiment and lodging. **Ch.  
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268A, 269**

(*Cf.* Baillie, 441.

**269. Maintenance of children and grandchildren.**—(1) A father is bound to maintain his sons until they have attained the age of puberty. He is also bound to maintain his daughters until they are married. But he is not bound to maintain his *adult* sons unless they are disabled by infirmity or disease. The fact that the children are in the custody of their mother during their infancy (s. 256) does not relieve the father from the obligation of maintaining them (*a*). But the father is not bound to maintain a child who is capable of being maintained out of his or her own property.

(2) If the father is poor, and incapable of earning by his own labour, the mother, if she is in easy circumstances, is bound to maintain her children as the father would be.

(3) If the father is poor and infirm, and the mother also is poor, the obligation to maintain the children lies on the grandfather, provided he is in easy circumstances.

*Hedaya*, 148; Baillie, 459-462. A daughter when married passes into her husband's family, and there is no obligation on the members of her natural family to maintain her, not even if she is divorced (*b*).

*Right to maintenance: how long it continues.*—The effect of the Indian Majority Act, 1875, so far as Mahomedans are concerned, is to extend the minority of a person until he has completed the age of 18 years, except in matters of marriage, dower and divorce. In respect of these matters a Mahomedan is entitled to act when he attains the age of majority under the Mahomedan law. That age is reached when he attains puberty, that is, when he completes the age of 15 years. Sir Roland Wilson considers that since maintenance is not one of the excepted subjects, the age of minority for the purpose of maintenance must be deemed to have been extended until the age of 18 years

(a) *Emperor v. Ayshabai* (1904) 6 Bom. L. R. 586; *Mahomed Jusab v. Haji Adam* (1913) 87 Bom. 71, 15 I.C. 520 [a Cutchi Memon case]. *Allah Rakhi v. Karam Haki* (1933) 14 Lah. 770, 147 I.C. 123, ('88) A.L. 369; *Mt. Sarfraz Begum v. Miran Bakhsh* (1925) 9 Lah. 513, 112 I.C.

476, ('28) A.L. 543; *Muhaidin Tharaganar v. Sainambu Ammal* (1941) Mad. 750, (1941) 1 M.L.J. 508, (1941) M.W.N. 308, ('41) A.M. 582.  
(b) *Pabrichi v. Kunhaacha* (1918) 34 Mad. 385, 18 I.C. 236.



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[Anglo-Muhammadan Law, ss. 140, 142]. This view, it is submitted, is not correct. The effect of the Indian Majority Act is to extend the period of *incapacity* to act in matters other than the three mentioned above, *e.g.*, contracts, wills, gifts, wakfs, etc. It is not to enlarge the duration of a *right* or of the corresponding duty. The children, therefore, of a Mahomedan have no right to maintenance after they have attained the age of puberty, nor is there any obligation on the parents to maintain them after that age, except, as stated above, in the case of a son who is disabled by infirmity or disease.

*Maintenance where daughter stays away from father.*—Where the father is entitled to the custody of the daughter and offers to keep her in the house and maintain her, the daughter has no right to separate maintenance unless there are circumstances which justify the daughter in staying away from the father's house (c). In this case the facts were that the daughter's mother had been divorced and the father had married again. The father did not offer to keep her in the house and later on became a lunatic. These circumstances were held to be sufficient to entitle the daughter to separate maintenance. But a single Judge of the Madras High Court has expressed the view that the father's liability to maintain his children is absolute and if the father has any right of custody of his children, he is entitled to enforce that right, but the fact that he has not done so or that his children are residing elsewhere did not deprive them of their right to claim maintenance from their father (d).

† 270. **Maintenance of parents.**—(1) Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.

(2) A son though in straitened circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.

(3) A son who, though poor, is earning something, is bound to support his poor father who earns nothing.

*Hodaya*, 148; *Baillie*, 465, 466.

270A. **Maintenance of grandparents.**—A person is bound to maintain his paternal and maternal grandfathers and grandmothers if they are poor, but not otherwise, to the same extent as he is bound to maintain his poor father.

*Baillie*, 466.

271. **Maintenance of other relations.**—Persons who are not themselves poor are bound to maintain their poor relations within the prohibited degrees in proportion to the share which they would inherit from them on their death.

*Baillie*, 467.

272. **Statutory obligation of father to maintain his children.**—If a father, who has sufficient means, neglects or refuses to

(c) *Bayabal v. Ermañ Ahmed* (1941) Bom. 643, 43 Bom.L.R. 823, 197 I.C. 161, (41) A.B. 369 (Decision of

a single Judge).  
(d) *Mukaidin Tharaganar v. Ganimbu Ammal*, *supra* (a).

maintain his legitimate or illegitimate children who are unable to maintain themselves, he may be compelled, under the provisions of the Code of Criminal Procedure, 1898, to make a monthly allowance, not exceeding one hundred rupees, for their maintenance.

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See the Code of Criminal Procedure, 1898, sec. 488 as amended by sec. 131 of the Code of Criminal Procedure (Amendment) Act, 1923 (XVIII of 1923). If the children are illegitimate, the refusal of the mother to surrender them to the father is not a ground for refusing an order of maintenance (c): See sec. 261 above.

**273. Maintenance of wives.—**See secs. 213 to 215 above.

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(c) *Karyadan v Kayat Beeran* (1895) 19 Mad 461



## APPENDIX.

### ACT NO. VIII OF 1939.

(PASSED BY THE INDIAN LEGISLATURE.)

(Received the assent of the Governor-General on the  
17th March, 1939.)

*An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.*

WHEREAS it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie; It is hereby enacted as follows:—

Short title and extent.

1. (1) This Act may be called THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939.

(2) It extends to the whole of British India.

Grounds for decree for dissolution of marriage.

2. A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds namely:—

- (i) that the whereabouts of the husband have not been known for a period of four years;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;
- (v) that the husband was impotent at the time of the marriage and continues to be so;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen

years, repudiated the marriage before attaining the age of eighteen years;

Provided that the marriage has not been consummated;

(viii) that the husband treats her with cruelty, that is to say,—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(iv) on any other ground which is recognised as valid for the dissolution of marriages under Muslim law:

Provided that—

(a) no decree shall be passed on ground (iii) until the sentence has become final;

(b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

(c) before passing a decree on ground (v) the Court shall on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

Notice to be served  
on heirs of the hus-  
band when the hus-  
band's whereabouts  
are not known.

3. In a suit to which clause (i) of section 2 applies—

(a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,

(b) notice of the suit shall be served on such persons, and

(c) such persons shall have the right to be heard in the suit:

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

**4.** The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage:

Effect of conversion to another faith.

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2:

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who embraces her former faith.

**5.** Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

Rights to dower not to be affected.

**6.** Section 5 of the Muslim Personal Law (Shariat) Application Act, 1937, is hereby repealed.

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